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Sup. Ct.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1940

No. 30

MONTGOMERY WARD AND COMPANY,
PETITIONER,

vs.

LUTHER M. DUNCAN

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR CERTIORARI FILED MARCH 15, 1940.

CERTIORARI GRANTED APRIL 8, 1940.

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Pleas and proceedings in the United States Circuit Court of Appeals for the Eighth Circuit, at the November Term, 1939, of said Court, before the Honorable Kimbrough Stone, the Honorable John B. Sanborn and the Honorable Seth Thomas, Circuit Judges.

Attest:

E. E. KOCH,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

(Seal)

Be It Remembered that heretofore, to-wit: on the third day of August, A. D. 1939, a transcript of record pursuant to an appeal from the District Court of the United States for the Eastern District of Arkansas, was filed in the office of the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, in a certain cause wherein Luther M. Duncan was Appellant and Montgomery Ward & Company was appellee, which said transcript as prepared, printed and certified by the Clerk of said District Court in pursuance of the order of the United States Circuit Court of Appeals of July 11, 1939, is in the words and figures following, to-wit:

(CAPTION IN CIRCUIT COURT OF APPEALS.)

United States Circuit Court of Appeals

EIGHTH CIRCUIT

No. 11,536.
CIVIL.

LUTHER M. DUNCAN, APPELLANT,

vs.

MONTGOMERY WARD & COMPANY, APPELLEE.

(CAPTION IN TRIAL COURT.)

In the United States District Court

EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

NO. 10.
CIVIL.

LUTHER M. DUNCAN, PLAINTIFF,

vs.

MONTGOMERY WARD & CO., DEFENDANT.

(COMPLAINT AT LAW).

(Filed in Pulaski Circuit Court August 31, 1938.)

Plaintiff alleges that he is a resident of Little Rock, Pulaski County, Arkansas, and that the defendant is a corporation organized and existing under the laws of the State of Illinois, and is domesticated under the laws of the State of Arkansas.

Plaintiff alleges that, at all times mentioned herein, he was employed by the defendant, Montgomery Ward & Company, as a truck driver, and at all times mentioned herein Jake Jackson was employed by said defendant as a helper on said truck.

Plaintiff alleges that, on July 3, 1938, he and Jake Jackson were instructed by the defendant to deliver an ice box to Greenbriar, in Faulkner County, Arkansas; that they proceeded to the place where said box was to be delivered; that they had backed the truck up to the porch of said place, and plaintiff and his helper were in the act of lowering said box to the porch, when, without warning, the said Jake Jackson suddenly raised his end of the box, causing the weight of said box, which was in excess of four hundred pounds, to be thrown on the plaintiff, causing serious and painful injuries to his back, particularly the fourth and fifth lumbar vertebrae; that it has been necessary to perform a major operation to remove a portion of the fifth lumbar vertebra. Plaintiff is advised, believes, and therefore alleges, that it will be necessary to perform another major operation for the removal of a portion of the fourth lumbar vertebra.

Plaintiff alleges that he has been totally incapacitated from performing any sort of work since the date of said injury and has suffered excruciating physical pain and mental anguish.

Plaintiff alleges that, prior to said injury, he was an able-bodied man, 29 years of age and was capable of earning the sum of One Thousand Dollars per year. Plaintiff alleges that he is advised, believes, and therefore alleges, that he will never be able to engage in heavy work again, and that, for the loss of said earning capacity, he has been damaged in the sum of $35,000.00. Plaintiff alleges that he is advised, believes, and therefore alleges, that he will, in the future, continue to suffer excruciating physical pain and mental anguish for a long period of time, damaging him in the further sum of $5,000.00. Plaintiff alleges that he is advised, believes, and therefore alleges, that it will be necessary to expend large sums of money in the future, in addition to sums already incurred, for medical and hospital treatment, damaging plaintiff in the additional sum of $5,000.00.

WHEREFORE, Plaintiff prays judgment against the defendant in the sum of $45,000.00, for his costs herein expended, and all other proper relief.

O. W. WIGGINS,
EDWARD H. COULTER,
KENNETH W. COULTER.

(NOTATION BY APPELLANT INCIDENT TO REMOVAL OF CAUSE.)

(This cause was, in apt time, and on September 16, 1938, on motion of appellee, removed from the Circuit Court of Pulaski County, Arkansas, to the United States District Court for the Eastern District of Arkansas. No issue is raised as to the propriety or regularity of the removal, and the pleadings and orders pertaining thereto are, for that reason, omitted.)

(ANSWER.)

(Filed in United States District Court October 6, 1938.)

Comes the defendant, Montgomery Ward & Company and for its answer herein states:

Admits that the defendant is an Illinois corporation and is domesticated under the laws of Arkansas.

Denies that the plaintiff was employed by this defendant as a truck driver at the times mentioned in plaintiff's complaint, and denies that Jake Jackson was employed by this defendant as a helper on said truck at the times mentioned in plaintiff's complaint.

Denies that on July 3, 1938, the plaintiff and Jake Jackson were instructed by the defendant to deliver an ice box to Greenbriar in Faulkner County, Arkansas. This defendant is without knowledge and information sufficient to form a belief as to the truth of plaintiff's allegations that Jake Jackson and the plaintiff then proceeded to the place where said box was to be delivered and that they had backed the truck up to the porch of said place and plaintiff and Jake Jackson were in the act of lowering said box to the porch when, without warning, the said Jake Jackson suddenly raised his end of the box, causing the weight of said box, which was in excess of four hundred pounds, to be thrown on the plaintiff, causing serious and painful injuries to his back, particularly the fourth and fifth lumbar vertebrae, and that it has been necessary to perform a major operation to remove a portion of the fifth lumbar vertebra. This defendant is without knowledge or information sufficient to form a belief as to the truth of plaintiff's allegations that he has been advised and believes and that it will be necessary to perform another major operation for the removal of a portion of the fourth lumbar vertebra and his allegation that he has been totally incapacitated from performing any sort of work since the

date of said injury and has suffered excruciating physical pain and mental anguish.

This defendant is without knowledge or information sufficient to form a belief as to the truth of plaintiff's allegations alleging that prior to said injury he was an able-bodied man, 29 years af age, and was capable of earning the sum of $1,000 per year and that he will never be able to engage in heavy work again, and that he has been damaged in the sum of $35,000.00 for loss of earning capacity, or that he has been so advised or so believes. This defendant is without knowledge or information sufficient to form a belief as to the truth of plaintiff's allegation that he will in the future continue to suffer excruciating physical pain and mental anguish for a long period of time, damaging him in the further sum of $5,000.00, or that he is so advised or so believes. This defendant is without knowledge or information sufficient to form a belief as to the truth of plaintiff's allegation that it will be necessary for him to expend large sums of money in the future in addition to sums already incurred for medical and hospital treatment, damaging plaintiff in the additional sum of $5,000.00, or that he is so advised or so believes.

And for its further answer herein, this defendant pleads:

That the plaintiff and Jake Jackson at the times mentioned in plaintiff's complaint were in the employ of one E. L. Santee, who, during the times mentioned in plaintiff's complaint, was under contract with this defendant to make deliveries of merchandise sold by this defendant to its customers in the Little Rock territory. That the said E. L. Santee was an independent contractor in the making of said deliveries and the plaintiff and the said Jake Jackson were solely in the employ of the said E. L. Santee and this defendant had no control whatsoever over either of them and was not responsible for any of their actions.

WHEREFORE, defendant prays that plaintiff's complaint be dismissed at plaintiff's cost, and for all other proper and legal relief.

MOORE, BURROW & CHOWNING,
and
FRANK E. CHOWNING,
Attorneys for Defendant.

(ORDER PERMITTING AMENDMENT TO COMPLAINT.)

(Entered in United States District Court February 10, 1939.)

On this 10th day of February, 1939, this cause comes on for hearing on the application of plaintiff for permission to amend his complaint; and the court, having examined said proposed amendment, and being well and sufficiently advised in the premises, finds that the said request should be granted.

It is, therefore, by the court CONSIDERED, ORDERED and ADJUDGED that the plaintiff be, and he is hereby, granted permission to file his proffered amendment to his complaint herein.

THOMAS C. TRIMBLE,
Judge

(AMENDMENT TO COMPLAINT.)

(Filed in United States District Court February 10, 1939.)

The plaintiff, by way of amendment to his original complaint, and in addition to the injuries therein set out, says:

First: That he received his injury on or about June 27, 1939, whereas, the original complaint incorrectly alleges that said injury was received on July 3, 1938;

Second: That, in addition to the injuries described in the original complaint, further examination develops the following further and more definite injuries, all of which were the direct result of the negligence of defendant, as set out in the original complaint: (1) that plaintiff received an injury to his back in the region of the fifth lumbar vertebra, and an injury to said vertebra, of such serious nature that it became necessary, on or about July 6, that he undergo a major operation in which a portion of said vertebra was removed; (2) that, thereafter, and on or about August 12, as a direct result of said injury, it became necessary for plaintiff again to submit to a major operation, at which time a part of the fourth lumbar vertebra was removed, together with a portion of the intervertebral disc; (3) that, since said date, he has suffered intense and excruciating pain, and has been compelled to have administered to him sacral injections, all as a result of said injury caused by the negligence of the defendant; (4) that, as a result of said injury, caused by the negligence of the defendant, plaintiff has suffered a protrusion of said lumbar vertebrae; and (5) that, as a result of said negligence and injury, plaintiff is totally disabled, and that such disability appears permanent.

Third: That the negligence of defendant, more definitely and specifically set out, and supplementing the allegations of the original complaint, is based upon the following state of facts: that the ice box described in the complaint had been transported in, and was being unloaded from, a covered truck or van, the end gate of which could be lowered to a horizontal position on a level with the floor of the bed of the truck; that the floor of the truck bed, and said end gate when lowered, were slightly higher than the porch floor to which said box was being removed by plaintiff and his co-worker; that, because of the excessive weight of said box, and because of the position in which plaintiff was placed in stepping down,

backwards, from said truck to said porch floor, caution on the part of his co-worker was necessary, and was usual and customary, and had been exercised on previous like occasions, and was reasonably expected by plaintiff on this occasion, to prevent injury to plaintiff by throwing an excessive load or weight upon him; that, about the time plaintiff stepped backwards from said truck floor to said porch floor, bearing the weight of one side of said box, his co-worker, having cleared the top or cover of said truck bed, unexpectedly, carelessly and negligently straightened up and raised his side of said box, at a time when he should have kept the same lowered and on a level with that of plaintiff, and thus threw practically the entire weight of said box on plaintiff at a time when plaintiff was in a hazardous position and unable to stand such weight or strain; and that it was as a result of said negligence on the part of his co-worker that plaintiff received the injuries set out in the original complaint, and in this amendment.

WHEREFORE, plaintiff prays as in his original complaint, and for general relief.

KENNETH W. COULTER,
O. W. WIGGINS,
FRED A. DONHAM,
Attorneys for Plaintiff.

(ANSWER TO PLAINTIFF'S AMENDMENT.)

(Filed in United States District Court February 16, 1939.)

Comes the defendant, Montgomery Ward & Company, and by leave of the court files this, its answer to plaintiff's amendment to complaint filed in this cause:

Defendant denies each and every material allegation of plaintiff's amendment to complaint and particularly those paragraphs designated as "First",

"Second" and "Third" paragraphs of said amendment to complaint.

And for its further answer herein this defendant pleads:

1. That the plaintiff and plaintiff's co-worker, Jake Jackson, referred to in plaintiff's complaint and amendment to complaint, were both employees of E. L. Santee at all times mentioned in the pleadings herein, and that E. L. Santee, their employer, was an individual, and if the plaintiff received an injury, as alleged, and such injury was caused either wholly or in part by the negligence of the said Jake Jackson, that such negligence, if any, was the negligence of a fellow-servant of the plaintiff for which the plaintiff cannot recover, and this defendant pleads the fellow-servant rule in defense of this action.

2. That the plaintiff at the time of the alleged injury was in sole charge of the truck then being operated by him as an employee of E. L. Santee and had full authority over the said Jake Jackson, and that if the plaintiff received any injury at the time and in the manner set forth in his complaint that such injury was caused or contributed to by the plaintiff's own negligence, first, in failing to give the said Jake Jackson proper instructions for the lifting of said ice box from said truck to said platform, and, second, in failing to exercise due care for his own safety in lifting said ice box from the truck to the porch floor referred to in plaintiff's amendment to complaint, and this defendant pleads plaintiff's contributory negligence as a complete bar to his cause of action herein.

3. That the injuries received by the plaintiff, if any, were the natural and proximate results of the ordinary risks and hazards of the work in which plaintiff was engaged and which plaintiff was performing at the time of his alleged injury, which risks and hazards were open and obvious and were known and appreciated by him and were assumed by him in the

course of such employment, and this defendant pleads such assumption of risk by the plaintiff as a complete bar to this suit.

WHEREFORE, defendant renews the prayer contained in its original answer herein and prays that plaintiff's complaint and amendment to complaint be dismissed at plaintiff's costs, and for all other proper and legal relief.

MOORE, BURROW & CHOWNING,
FRANK E. CHOWNING,
Attorneys for Defendant.

(MOTIONS TO STRIKE PORTIONS OF DEFENDANT'S "ANSWER TO PLAINTIFF'S AMENDMENT TO COMPLAINT.")

(Filed in United States District Court February 16, 1939.)

The plaintiff interposes the following separate and distinct motions to strike certain portions of defendant's "Answer to Plaintiff's Amendment to Complaint", to-wit:

MOTION NO. 1:

Plaintiff moves the court to strike all of that portion of defendant's "Answer to Plaintiff's Amendment to Complaint" contained in paragraph number "1"; and, in support of his motion, he says:

1. That said paragraph is not in answer to any allegations contained in plaintiff's amendment to his complaint;

2. That said paragraph interposes issues and defenses entirely new;

3. That the new issues and defenses set out in said paragraph are not seasonably and in apt time interposed;

4. That the issues and defenses set out in said

paragraph are inconsistent with the issues and defenses set out in the original answer.

(NOTE: Here follow two separate motions, designated "2" and "3", which are identical with "1", supra, except that they are directed to paragraphs "2" and "3" of the answer to the amendment to the complaint, which motions, for the sake of brevity, are not here repeated.)

WHEREFORE, plaintiff prays, as to each of his separate and distinct motions above set out, that the same be separately granted.

KENNETH W. COULTER,
O. W. WIGGINS,
FRED A. DONHAM,
Attorneys for Plaintiff.

(ORDER PERMITTING AMENDMENT TO ANSWER AND OVERRULING MOTION TO STRIKE)

(Entered in United States District Court February 16, 1939.)

On this 16th day of February, 1939, this cause comes on for hearing on the application of defendant for permission to amend its answer, and on the three separate motions of plaintiff to strike certain portions of the proffered answer of defendant; and the court, being well and sufficiently advised in the premises, finds that the defendant should be permitted to file its proffered amendment to its answer, and that the three separate and distinct motions of plaintiff to strike certain portions of said answer should be overruled.

It is, therefore, by the court considered, ordered and adjudged that the defendant be, and it is hereby, granted permission to file its proffered amendment or "Answer to Plaintiff's Amendment to Complaint", and that the three separate motions of plaintiff to

strike certain portions of said answer to plaintiff's amendment to complaint be, and the same are hereby, separately and severally, overruled and denied.

To the action of the court in overruling each of said separate motions to strike, plaintiff objects and saves his exceptions.

THOMAS C. TRIMBLE,
Judge.

(STATEMENT OF EVIDENCE.)
IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DIVISION OF THE EASTERN DISTRICT OF ARKANSAS.

LUTHER M. DUNCAN .....*Plaintiff,*
vs. No. 10. Civil.
MONTGOMERY WARD & COMPANY..... *Defendant.*

BE IT REMEMBERED, that, on this the 16th day of February, 1939, this cause coming on to be heard before the HONORABLE THOMAS C. TRIMBLE, judge of the Court aforesaid, the plaintiff appearing in person and by MESSRS. COULTER & COULTER, and O. W. WIGGINS, of Little Rock, as his counsel, and the defendant appearing and being present by MR. FRANK CHOWNING, of the firm of MOORE, BURROW AND CHOWNING, of Little Rock, as its counsel, and all parties announcing ready for trial, a jury was duly empanelled and sworn to try the cause, when, among others, the following proceedings were had:

The plaintiff, to sustain the issues in his behalf, offered the following evidence in chief:

LUTHER M. DUNCAN, a witness in his own behalf, being first duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. E. H. COULTER:

My name is Luther Madison Duncan. I am the

plaintiff in this case. I will be 30 years old in April. I reside at 1013 McGowan Street, Little Rock, and have lived in Pulaski and Lonoke Counties all of my life. I began working for the Merchants Transfer Company in 1934, and stayed with them until I went with Montgomery Ward & Company on June 13, 1938. I first discussed the matter of my going to work for Montgomery Ward & Company with a friend of mine from whom I got information that they might need an additional driver; "and the next day he went back up there and Mr. Smothers called me up." Mr. Smothers "is the shipping clerk up there" at Montgomery Ward & Company. "He said to come up; he wanted to see me." "I went up Friday." That was somewhere along about the 10th of June.

Q. "What was the nature of the discussion that you had with Mr. Smothers?" A. "Well, I went up there and talked with Mr. Smothers and he said he thought they were going to need another person, and I said that I would like to have the job, and he said 'Alright, we will go up and talk to Mr. Greco.' " Q. "Who was Mr. Greco, if you know?" A. "He is the manager down there; I did not know at that time who he was." Q. "You have since learned that he is the manager of Montgomery-Ward & Company?" A. "Yes, sir, Mr. Smothers carried me up there and he was busy right then, and he said 'Wait a minute,' and then Mr. Greco called me in."

Q. "What was the nature of your discussion with Mr. Greco?" A. "I told him I heard he was going to be needing a hand and he replied that, 'the fact of the matter, I was, but I taken an application from another fellow awhile ago'; and he says, 'I will take your application blank and let you fill it out, and consider it too.' " Q. "And did he do that?" A. "Yes, sir, and I had to give three fellows as references." Q. "What kind of an application was that?" A. "It was a printed form." Q. "Furnished you by Mr. Greco?" A. "Yes, sir." Q. "Do you remember when

you returned that executed application to them?" A. "Well, no, sir, not exactly when, I think he gave it to me one evening and I filled it out and taken it back there the next morning." Q. "Well, when did you next hear from them after that?" A. "Well, it was on Friday, I had been to work and just came in from work, and the Postal Telegraph boy drove up on his wheel as I went in the yard, and Mr. Greco sent me word to see them before six o'clock that evening or early Saturday morning, and I looked at the clock, and it was then a few minutes before six, and I told my wife I would jump in my car and go up there, and I went." Q. "Did you talk to him?" A. "Yes, sir; he told me what he wanted; then he went to discussing did I think I was capable of taking care of the job and his customers, and I told him I was, and he said, 'That is a mighty important job, as important a job as we have in the store. You have to give the customers courtesy and kindness and be nice to them;' and I says, 'I believe I can'; and I says, 'If I can't, that is up to you'; and I says, 'I will do the best I can, and I will do everything in my power to keep your customers and get you new ones.' And then he says, 'How much will you start in for?'; and I says, 'How much do you pay?'; and he says, 'That is owing to how good a man you are'. In a joking way, and I said, 'I am a pretty good little man', and he kept on saying, 'What will you start in for?', and I says, 'I wouldn't start in for less than $15.00 a week and work two weeks and then get a raise'; and he says, 'Why that is a top price'; and I says, 'That's all I'll start for'; and I says, 'I have been with Merchants seven years and I know how to deal with people'; and he says: 'Expenses has been running awful high on that truck, and if you can keep them cut down I will consider a raise'; and he says, 'I would like for you to come up Saturday morning and go with that truck and kind of learn how to handle the details and things.' " I did that. Mr. Cain was on the truck at the time I went up there. "He went ahead and worked that Saturday and I just

went on the truck that Saturday with him", "just learning the methods."

Q. "What kind of truck was that, Mr. Duncan?" A. "It was a Chevrolet truck, about a '37 model, '36 or '37." Q. "Had a covered van body on it?" A. "Yes, sir." Q. "Did it have any signs on it?" A. "Yes, sir." Q. "What did it have?" A. "Montgomery-Ward and Company." Q. "Where was it?" A. "Little Rock, Arkansas." Q. "Where was that sign painted on it?" A. "It was painted out on the side of the body." Q. "Along the side of the van body on the truck?" A. "The van body." Q. "In big letters?" A. "Yes, sir."

CROSS EXAMINATION BY MR. CHOWNING:

Q. "How long after you went down to see Mr. Greco about applying for a job was it before you went to work on the truck?" A. "Well, now I would not be exact what date it was, it was either Monday or Tuesday that I went up there and he gave me an application, it was Wednesday, I believe, I would not be positive about that, and I carried it back up there Thursday morning early." Q. "Now, when you went down there you applied to him for a job with Montgomery Ward & Company, did you not?" A. "Yes, sir." Q. "And he took your application for that?" A. "Yes, sir." Q. "Now, later, when you were called about this truck job, isn't it a fact that you were told that the driver of Mr. Santee's truck, who was engaged in making deliveries for Montgomery Ward and Company, was getting ready to quit the job, and that Mr. Greco said that he had recommended you to Mr. Santee for the job, and had spoken to Mr. Santee about it?" A. "No, sir." Q. "He did not tell you that?" A. "No, sir." Q. "What did he tell you?" A. "Well, I went up there and talked to him, and asked him for the job." Q. "You are talking now about your getting the message?" A. "No, sir, that was before." Q. "Didn't you apply for this truck job the first time you went up there?" A. "Yes, sir." Q. "How did you know there

was any truck job open; there was not at that time, was there?" A. "Mr. Smothers told me." Q. "Mr. Smothers told you what?" A. "Told me he was fixing to quit." Q. "Mr. Smothers is a man who worked for Montgomery-Ward and Company?" A. "Yes, sir." Q. "He is not a manager?" A. "No, sir." Q. "And not an assistant manager?" A. "No, sir." Q. "He is just an employee?" A. "Yes, sir; he is a shipping clerk." Q. "Then you got your information from Mr. Smothers that Mr. Cain was going to quit?" A. "He did not say Mr. Cain was going to quit; he said there was going to be an opening on the truck." Q. "Didn't he tell you who owned the truck?" A. "No, sir." Q. "Now, you went to work on the truck one day with Mr. Cain while he was still working?" A. "Yes, sir." Q. "And went around with him?" A. "Yes, sir." Q. "And did you stay with him all day on the truck?" A. "Well, up until about three o'clock that afternoon." Q. "Did you know then who the truck was owned by?" A. "Well I did at that time." Q. "Did Cain tell you?" A. "Yes, sir." A. "Who did he tell you owned it?" A. "He told me it belonged to Mr. Santee." Q. "You understood from him that he was working for Mr. Santee?" A. "No, sir." Q. "When you went—the next day you went on the truck, was it—or the next day after that?" A. "No, it was Monday." Q. "You think you went with Mr. Cain on the truck along about Friday, do you?" A. "Saturday." Q. "Now, on Monday, you drove the truck yourself?" A. "Yes, sir." Q. "And Jacob Jackson was your helper on the truck?" A. "Yes, sir." Q. "Now, what did you do with your truck at night, Mr. Duncan?" A. "I carried it over to 14th and Gaines and put it in the garage over there." Q. "Was Mr. Santee around occasionally?" A. "I didn't see him the first morning, and I did not see Mr. Santee until the second morning I went after the truck, and I asked some of the boys if that was Mr. Santee; I learned in between times that he owned the truck."

Q. "When did you know you were working for Mr. Santee?" A. "I didn't ever know it." Q. "How long did you work on that job?" A. "I worked about two weeks, or thirteen days." Q. "And during that time you didn't know, never did know, you were working for Mr. Santee?" A. "No, sir." Q. "Did Mr. Santee ever say anything about the truck?" A. "No, sir, only told me where to get the gas." Q. "Where to get the gas?" A. "Yes, sir, that is all he ever told me."

Q. "And you say that Mr. Cain told you that he was going to speak to Mr. Santee about you working on this job?" A. "No, sir."

Q. "Now do you remember the day that you went to work?" A. "Well, it was on the 13th day of June, the 13th." Q. "June the 13th?" A. "Of course, I went up there and rode the truck the Saturday before the 13th on Monday." Q. "June the 13th was the first day your rode?" A. "Yes, sir." Q. "I mean you were employed driving the truck?" A. "Yes, sir." Q. "And you worked up and including the 27th?" A. "Yes, sir."

Q. "You say you were injured on the morning of the 27th?" A. "Yes, sir." Q. "Of the same month?" A. "Yes, sir." Q. "When you came back from Greenbriar, you got off of your truck and that was sometime before noon, and did not work any more; is that right?" A. "No, sir; I came back from Greenbriar about three o'clock, and my back was hurting me and I went down into the shipping department to Mr. Smothers, and he had some small packages and wanted them delivered, and I said, 'Don't give me anything heavy, because I can't take that'; and he gave me two or three small ones, and Jake carried them in, all except a C. O. D., and I got out and carried it into the house, and the next morning my wife tried to get me not to go back to work, and I said I needed work so bad, and I went on up, and got the truck, and I picked

up another colored boy to help me make deliveries, and I delivered a bed room suite out on Park Hill and started to get out of the truck back at the store, about noon, and I turned my feet and started to slide off the seat and my feet went from under me and the glass in the window was down on the truck and I ran my arm through and just held myself up and Jake came and got me out and I went on upstairs and told Mr. Greco I hurt my back and said I could not work, and he advised me to go to a doctor." Q. "He did not send you to a doctor?" A. "No, sir, he said 'We have a company doctor, but you don't come under that contract,' and I says I didn't have any money to pay any doctor fifteen or twenty dollars for an examination." Q. "Where did you go?" A. "To Trinity Hospital." Q. "When you got this injury on June 27th, when did you first go out to the Trinity Hospital for that examination?" A. "Went out there on the 28th." Q. "And what did they do?" A. "Well, they examined me and taped up my back and I went on back home and he told me he wanted to see me in a couple of days, and I went back out there then and my back was hurting and my legs were going 'hay-wire' both of them, and I had to kind of drag them along, and I didn't have any use for them, and I went out there and told him something had to be done, that I was losing the use of my legs, and they taken some X-rays." Q. "That was on the 29th?" A. "I would not be positive." Q. "It was prior to the 6th day of July; that's when you had your first operation?" A. "Yes, sir." Q. "They took some X-rays?" A. "Yes, sir." Q. "Alright, then what happened?" A. "Well, the doctor told me before he taken the X-rays, when I went out there for the examination, he says, 'I think I am going to have to put you in a cast, or brace, and see', but he taken these X-rays and come to me and said, 'No, it won't work, the only thing that will do you any good is an operation'; and by that time my legs were paralyzed on me." Q. "That all happened before the 9th of July?" A. "Yes, sir." Q. "Now, did you go out

there on the 9th for an operation or the afternoon before?" A. "No, sir, it was the sixth of July." Q. "And they did operate?" A. "Yes, sir." Q. "Do you know what they did at that time?" A. "No, sir." Q. "Did they put you under an anaesthetic?" A. "No, sir, just a local." Q. "When did they next operate on you, Mr. Duncan?" A. "Well, I wouldn't be positive about that, on what date it was; it was somewhere in September." Q. "Did they give you a general anaesthetic on that occasion?" A. "Yes, sir, it ran out and then they had to put me to sleep and give me ether." Q. "Do you know how long you were on the operation table?" A. "Well, no, sir, right around three hours; I would not be positive of the minutes; three hours and some odd minutes." Q. "Do you know how long it took them to do the first operation?" A. "It was two hours and some forty-odd minutes." Q. "And they did not give you a general anaesthetic at that time?" A. "No, sir." Q. "Just a local?" A. "Yes, sir." Q. "You don't know what they did the second time?" A. "No, sir." Q. "Did they tell you either time?" A. "They told me them vertebrae, and I couldn't explain which, were pinching my spine and nerves in there, and the second time there was something pinching this left leg, and it went hay-wire, and I had to drag it along, and the second time they went in there and straightened it up."

Q. "Mr. Duncan, if you get uncomfortable or want to rest, let me know." A. "It's getting pretty tough." MR. CHOWNING: "I have got to pursue this examination, your Honor, but I don't want to pursue it to the point of making it difficult for him." THE COURT: "Are you getting to where you want to rest?" A. "I believe I am." THE COURT: "Then you may step down."

(Here the Court recessed for five minutes.)

C. C. COLLUM, a witness on behalf of plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. E. H. COULTER:

My name is C. C. Collum. I live at 1422 East 9th Street, Little Rock, Arkansas. I am 46 years' old, and am engaged in the grocery business. I know Luther Duncan, and remember the circumstance along sometime last summer, possibly the first part of June, when I endorsed a recommendation for him on an application to the Montgomery Ward Company for employment. Montgomery Ward & Company checked up on that by calling me as one of the references.

I have known Luther Duncan ever since he was 7 or 8 years old. He looked to be robust and healthy. He traded with me at the store and I saw him two or three times a week. I never heard of him having any illness, and never did know of any injury until this suit.

CROSS-EXAMINATION BY MR. FRANK CHOWNING:

I did not know who was talking on the occasion when they called up. I stepped back and let my wife do the talking. I don't know what the other party said. I do not know anything about Mr. Duncan going down there to work on the truck or anything about his injury—I know he said he was going to work for Montgomery Ward & Company and I recommended him as being a good worker.

(On request of counsel for the defendant, the court here instructed the jury not to consider the statement of the witness that plaintiff told him he was going to work for Montgomery Ward & Company.)

HUBERT SESSIONS, a witness on behalf of plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. E. H. COULTER:

My name is Hubert Sessions. I live at 1722 State Street, Little Rock, I am 25 years old. I for-

merly worked for Montgomery Ward and Company as assistant shipping clerk on the floor. I met Luther Duncan the day I got hurt, about the thirteenth day of June. He was with me at the time. We were lifting a refrigerator in the stockroom in the place of business of Montgomery Ward & Company here in Little Rock. I did not work but about two hours after Duncan started to work. I had an injury myself and had to leave, and did not come back. Duncan and I were working on that day under the direction of Mr. Smothers, the shipping clerk at Montgomery Ward & Company. Duncan appeared to be in perfect physical condition at that time.

CROSS-EXAMINATION BY MR. CHOWNING:

I first met Luther Duncan the day I got hurt in the stock-room. That was the day he went to work. We were moving refrigerators from the warehouse on Center Street to the stockroom on the second floor of the main store building. We had transported a whole truck load of them. I went around there and helped Duncan with the ice boxes. There wasn't anybody else with us that morning. That was on Monday, June 13.

I received an injury to my left hand. I will show it to the jury. It is scarred. That was cut on a piece of glass in the stockroom.

Q. "Isn't it a fact that you filed a suit against Montgomery Ward and Company and you alleged in the complaint that it was the result of Luther Duncan's negligence in throwing you against the glass that resulted in this injury?" A. "That is right."

RE-DIRECT EXAMINATION BY MR. E. H. COULTER:

Q. "Mr. Sessions, did I understand you to say in response to Mr. Chowning's question that you sued Montgomery Ward and Company for that injury alleging that you were injured as a result of Duncan's

negligence; is that correct?" A. "Yes, sir." Q. "Didn't you recover on that allegation?" A. "Do you mean that there was a settlement?" Q. "Did you get any money on that?"

MR. CHOWNING: "Now if the Court, please, I don't think that has got anything to do with this lawsuit."

THE COURT: "He would have a right to ask the question."

MR. COULTER: Q. "Did you get a settlement out of that cause of action?" A. "Yes, sir." Q. "A substantial settlement?" A. "Yes, sir." Q. "Would you mind saying how much?" A. "$2,500.00."

MR. CHOWNING: "I save exceptions to that question and answer and permitting the witness to answer that question."

MR. COULTER: Q. "Who represented Montgomery Ward and Company in that case?" A. "Tom Terral." Q. "Tom Terral represented you didn't he?" A. "Yes, sir." Q. "Didn't Mr. Chowning—" A. "Oh, Mr. Chowning represented Montgomery Ward and Company."

THE COURT: "Gentlemen of the jury, that will not be considered in evidence in this case as to what the recovery in this case—you have still the question to settle here."

HOUSTON GEAN, a witness called on behalf of plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. E. H. COULTER:

My name is Houston Gean. I am associated with the Pacific Mutual Life Insurance Company. In the course of my employment, I am familiar with the American Mortality Tables. I have those tables

before me. According to these tables, the life expectancy of a man twenty-nine years of age would be thirty-six years.

CROSS-EXAMINATION BY MR. CHOWNING:

The averages in these tables are based on a number of healthy risks. They are not based on disabled people. The average expectancy of disabled people would naturally be less than that of those on whom this particular table is based.

J. D. PARKER, a witness on behalf of plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. E. H. COULTER:

My name is J. D. Parker. I live at 324½ East Washington Street, North Little Rock. I am twenty-seven years old. I was in the employ of Montgomery Ward & Company here in Little Rock. My duties were driving a truck. I was in the same employment that Luther Duncan later took up. I left Montgomery Ward & Company sometime last year. I was told to work on the floor in the store of Montgomery Ward & Company while I was not driving the truck, and I did that.

CROSS-EXAMINATION BY MR. CHOWNING:

Mr. Santee and Mr. Greco told me to work on the floor at the store. I was supposed to help in the stock-room a little when I was not delivering, help Mr. Smothers do just anything that he had to do that he wanted me to do. Mr. Santee gave me those instructions. I first started to work for Mr. Santee in 1937 and drove his truck in making Montgomery Ward & Company deliveries about 12 months. Mr. Santee employed me on that job. He didn't have but two trucks at that time, and they were both on at the store.

RE-DIRECT EXAMINATION BY MR. E. H. COULTER:

Mr. Smothers, the shipping clerk, directed me how and when I was to work at the store. Mr. Santee paid me my salary. I was employed by Mr. Santee.

RE-CROSS EXAMINATION BY MR. CHOWNING:

It was the custom, when Montgomery Ward & Company sold an article that had to be delivered out in Little Rock or the Little Rock territory, for the shipping clerk at the store to put a tag on the article, and for me and my helper on the truck to load it on the truck and deliver it. I was in complete charge of the truck on these deliveries, acted as boss over my helper, and instructed him what to do.

DR. R. R. ANDERSON, a witness called on behalf of plaintiff being first duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. E. H. COULTER:

I am 28 years old, a Roentgenologist by profession, and have had training for that work. I am connected with Trinity Hospital. I know Luther Duncan, and have been called upon to do X-ray work for him within the last 12 months. I was called on to take X-rays of the lower part of Mr. Duncan's spine in order to determine if there were any pathological lesions there explaining his present difficulty. I found that Mr. Duncan had an operative procedure on his fourth and fifth lumbar vertebrae. The pictures which I made were taken on February 15 of this year. At that time I took three X-ray pictures. I conferred with Dr. Mahlon D. Ogden with reference to these pictures. I shall be glad to identify these pictures and leave them here for examination by Dr. Ogden. There were four pictures made but one was made when I was not Roentgenologist at Trinity Hospital. I

identify the three I made as Exhibits "A", "B" and "C", and leave them here.

CROSS-EXAMINATION BY MR. CHOWNING:

I have been connected with Trinity Hospital since August, 1938. The X-ray pictures which I identified and introduced are pictures of Mr. Duncan taken on February 15, yesterday. They were taken on the 14th, and developed, dried and examined yesterday. I do not know definitely by whom the one other picture I have was taken, because it was taken before I was here; but I understand it was taken by Dr. Ogden, Jr., and interpreted by him. There were two or three pictures taken of his pelvis on other occasions, which were taken under my supervision. I have one other picture here with me. It was taken before my time. The chart shows it was taken on 8-14-38. It can be identified by its serial number, 23445-L. I do not know who took it. It was interpreted by Dr. Ogden, Jr. The chart shows other pictures were taken, as follows: 7-3-38, four pictures were taken, all identified by the serial number 23282; 3-29-38, one picture of the lumbar spine, number 23981; 8-4-38, four pictures, number 23445; 11-28-38, two pictures of the pelvis, number 23790; 12-19-38, one picture of the pelvis region, number 23884.

The chart shows that the pictures which I took, which have been identified by me as having been taken on February 14, were taken on February 13. These were of the lumbar spine, and bear serial number 24115.

(Mr. Coulter: "These pictures were not introduced. They were merely identified and left here for reference.")

In addition to the pictures identified and left for further reference, I have two other pictures—one that was made by me and bears the same serial number as those identified as having been made by me, which

I also now leave with the court reporter as Exhibit "D". These were the pictures taken 2-13-39. I have charge of all X-ray pictures at the hospital, even though some of them I did not take. I will bring to court the remaining pictures mentioned in my testimony.

(Here the court recessed for the noon hour; and, at 1:30 p. m., reconvened and proceeded as follows):

DR. R. R. ANDERSON, being recalled for further cross-examination by Mr. Chowning, testified as follows:

I now have with me the other X-rays referred to in my testimony this morning. These I now leave with the reporter as I did the first four. There are 12 additional pictures. My duties consisted of taking the pictures and in collaborating with the surgeon in reading them. The custom, however, is for the X-ray doctor to read the pictures and present a report to the surgeon, and then the two consult together about the conclusions.

DR. MAHLON D. OGDEN, a witness on behalf of plaintiff, being first duly sworn, and his qualifications as a physician and surgeon having been admitted by counsel for defendant, testified as follows:

DIRECT EXAMINATION BY MR. E. H. COULTER:

I know Luther Duncan, the plaintiff in this case, and have had occasion to treat him in Trinity Hospital here in Little Rock. I first saw him on June 28, 1938, in connection with the alleged injury about which he is now complaining. He was there in March of last year for an hour's visit, or some such matter. We made an X-ray on March 13, 1938. I did not examine him at that time. My son, Dr. Ogden, Jr., examined him. He was not confined to the hospital at that time. He just came there for an examination. I examined him when he was at the hospital in June,

and have treated him since that time as his regular physician.

Q. "I will ask you, without my going into all the technicalities, just describe what you found upon your examination; what treatment you administered, and the condition the patient had and the history of his trouble down to the present?" A. "I saw Mr. Duncan first on June 28th, last; he came complaining of a severe pain in his lower back which he said followed an injury. The examination at that time showed signs of an injury to the lower back and spasm of the muscles and other signs in the way of different diagnosis. X-rays were made at that time, and the X-rays did not show any injury to the bones of the back. The pain continued so another kind of X-ray was made whereby a solution was injected into the spine which throws a shadow and this solution running down the spinal canal showed that there was a projection on the inside of the spinal canal which pressed on the nerves as they left the spinal cord. This congestion was part of the cartilage between two of the vertebrae. The vertebrae in the front part do not rest directly on one another but in between them there is a disc of cartilage which separates them and acts as a cushion or spring and in certain sprains we have a part of that cartilage which is forced out into the spinal canal and causes these symptoms. This cartilage does not throw a shadow on the X-ray picture. Therefore, it cannot be diagnosed just by the ordinary X-ray pictures, but when this solution is put into the spine and runs down it will show quite a defect in that shadow which shows that there is something sticking into it; this shows by one of the pictures that was brought up by Doctor Anderson this morning, and is the only picture, of all the x-ray pictures, which showed the definite injury to the back. The other pictures showed the results of the operations and so forth. Following this finding, we operated on him and in order to get inside of the spinal canal, you

have to take out a part of the bone covering it which we did and removed this portion of the cartilage which was in the spinal canal. Following that, he improved quite a bit; that pain on his left side improved and at first he complained of pain on both sides, he was kept in bed, of course, for a while after that, and after he got up and got to going around his pain recurred on his right side. We then went in again thinking that we had overlooked a portion of the cartilage that was causing the trouble already or that there was an injury to the joint, one of the spinal joints, going in, however, and looking around, we did not find anything we had overlooked and we went up to another vertebra higher to get a thorough inspection; after that why he went along just about the same, however that last, that last operation was done in September. Following that he continued to have pains down his right sciatic nerve. Thinking perhaps the trouble was just sciatic due maybe to an inflammation of the nerve there following his injury, even after the cause had been removed, we used various treatments for that, injections in the lower part of the spinal canal which would temporarily relieve his pain, but when the effect of the treatment was worn off it would promptly come back. We used the injections around the sciatic nerve itself and incidentally in the course of these injections we broke a needle off down in his hip. I think that was made in September; we didn't do anything about it because it is not causing any trouble and there is no use subjecting him to another operation then to get at it and we will probably, if we have to go into the back again, which is highly probable, we can easily go get the needle at that time. That was in December and since then he has been in about the same condition, unable to sit or stand for any considerable length of time on account of the pain down his right sciatic nerve. His left side is now quite comfortable, he says. I believe that brings it about up to the present time."

The last spinal operation was in September, and I believe the needle was broken off sometime in December.

Q. "Doctor, what is his present physical condition with reference to his being able to do or perform any sort of physical labor?" A. "He cannot do any kind at all now; he is unable to stand or sit for any length of time." Q. "How long has that condition prevailed, since the injury in June?" A. "Approximately, yes; I think probably the first month or so he was laid up mostly from this operation and his other treatment; it would be a little hard to say but approximately since the operation, yes."

Since he has been able to be about since his injury, I advised him to take regular exercise and get rid of the trouble for lack of it.

Q. "Doctor, what is the medical name of his present trouble from which he is suffering if it can be described?" A. "Sciatic neuritis is the name of it." Q. "Is that known to the medical profession as a rather stubborn trouble?" A. "Yes, sir, quite stubborn." Q. "Is it true, doctor, a patient never recovers from that trouble?" A. "It is true that it quite often runs for quite awhile." Q. "It is true that they sometimes recover?" A. "Sometimes they recover, yes."

Where a patient has suffered from that trouble over a period of eight months, and has the history that this patient has, I would say that, in my opinion, without further corrective measures, he would stand a very poor chance to recover.

Q. "With that finding, is it your opinion that he would never be able to perform physical labor?" A. "Yes, he would not be able to perform physical labor which would require any amount of exertion at all."

Q. "Doctor, what are the things, the conditions

that would produce the condition that you find now in that patient?" A. "Pressure on the side of the spinal cord where this sciatic nerve comes off the spinal cord, also done from other causes."

CROSS EXAMINATION BY MR. CHOWNING:

Only one series of the x-ray pictures which were made at Trinity Hospital in one of the examinations showed a condition which led me to believe that one of the pads between the joints of the backbone or vertebrae had been injured. That was the series that was made with that opaque oil that was put in there. I did not bring a shadow box but I imagine it will show in this light. I identify one of the pictures previously identified as being the one from which I made my diagnosis. "Here it is; here this heavy shadow here is the oil in the spinal canal and extends on down to here, and right here is that gap if you can get it between you and the light you can see it, it ends here, begins here and right here is that gap where this cartilage between these two vertebrae has been forced back and presses."

The rest of the pictures did not show any injury to the bone of the back except what injuries I made by removing the bone. One cannot identify certainly whether the particular pad in question is between the fourth and fifth lumbar vertebrae, or the third and fourth. "I say that because Doctor Anderson and I have had several discussions about that; in many people there are six lumbar vertebrae instead of five and when there are six sometimes that sixth lumbar is knitted to the sacro-iliac and sometimes to the vertebra above; it is, in a way, an unimportant anatomical distinction as to which that is, it could be either between the fourth or fifth or it could be between the fifth and the sacrum. * * * There is a way to tell which one that is by taking a picture of the entire spine and counting the vertebrae down, but there wasn't any point in doing it in this."

When I cut the bone in order to get in there after that pad, I found a portion of the cartilage pressing into the spinal canal. There had been a rupture of that pad, and some of the filling of the pad had projected out into the spinal cord area. I removed the part that was protruding. I did not find any apparent diminished space between the vertebrae at that point, but the gap lower down had diminished. It was not ruptured.

I performed the first operation on the sixth day of July. The next operation was, I believe, sometime in September. On the first operation I removed a part of just one vertebra, the one below the ruptured pad, the fifth, I think. In the operation on September 18, I removed bone from the vertebra above it. I removed segments of only two vertebrae. There was a third operation, but not on the spine. "You might call it another operation, or you might not, the injection of various treatments into the sacral canal; that is down at the bottom of the spine, and into the various ligaments in which he was complaining of pain, and around the right sciatic nerve. We usually refer to those more as treatments rather than operations." Those injections are made with a long needle and hypodermic syringe. The needle in this case was probably three to three and a half inches long. The first injection was on June 29, into the side of ligaments of the spine, down the leg, where the spine joins the pelvis. This needle is broken off in the region of the sciatic nerve. We made an attempt to get the needle. We went down after the big end of it, but it had slipped down into some muscles, and no widespread operation was done. That was done, according to our records, on November 26. It was November instead of December. We made the effort to get the needle the day it was broken off.

I first saw the patient on June 28, the day after his alleged injury, and treated him on June 29 by some injection with a hypodermic needle, and operated

on his spine on July 6. Between then and September 14, treatment at the hospital consisted of other injections with a needle, diathermy and other means, but no further operation. Then, on September 14, a second operation was performed, and we continued to give him these injections, in which we used a novocaine solution and normal salt. "What we hope to do in these injections and quite often do, but not with any certainty in the injection or in the painful nerve, of this solution, and in and around the nerve, tear the tissues out and break out adhesions around the nerve which are often the cause of the pain, not always, we can't always tell whether the pain in the nerve is caused by adhesions around it or not, therefore the injection, not amounting to much, is tried as a method in the hope that the trouble is due to adhesions and that the injection will relieve it permanently, and sometimes it does and sometimes it does not." If the injection does not prove to be of permanent value, its effect will last only three or four hours. We gave Duncan some ten or twelve of these injections at rather wide intervals.

Q. "Now, Doctor, sciatic neuritis is caused by a great many things, isn't it?" A. "Yes, sir." Q. "Not always the result of an injury, not necessarily a traumatic injury, is it?" A. "Oh, yes, we have many cases that are not the result of an injury." Q. "In other words, you have a great many things, cases of sciatic neuritis, that you never know, the patient never knows, exactly what the origin of it is?" A. "That is true." Q. "And isn't it possible, Doctor, in these cases that occur from a strain, that they might be the result of lifting, just come about in an effort as a natural result of lifting a heavy object?" A. "Yes, sir." Q. "In other words, if a man would go out here and attempt to lift a sack of oats from the floor, he might get a strain in his lumbar region that might result in a severe attack of sciatic neuritis?" A. "That is right."

Q. "Now then, Doctor, do you think that any part of Mr. Duncan's present disability is due to the injury which you say you found of the cartilagenous pad between the vertebrae?" A. "I wish I could answer that; I really think that he has something in there we have not found; he got partial relief, other than relieving the pressure from this piece of cartilage. If his whole trouble had been due to that piece of cartilage alone he would have gotten full relief on both sides. He still has pain and disability on the right, and one reason for these recent pictures was to see if something would show up that might shed light on the present pain."

Q. "You did not ascribe the present pain that he is suffering on the right side to the injury that you found in his back, and for which you treated him, I am speaking now of the operation which you performed on that pad, and cutting away that protruding point?" A. "Evidently the pain he has now in his right sciatic nerve is not due to that projection of this cartilage because the projection has been removed and he still has his pain." Q. "Now what would you say, doctor, after you operated on that pad, I presume that it is healed completely by this time?" A. "Yes, sir." Q. "That pad would be in as good condition now as it was before the rupture?" A. "Oh, no; it is not, because the pad has lost some of its elastic element that carries the weight of the body, and it is not in as good condition as it was before the injury." Q. "How would that affect him, doctor?" A. "A stiff back." Q. "A stiff back?" A. "Yes, sir, he will compensate for his disability here by having a stiffness in the lower part of his back." Q. "A stiffness is not necessarily associated with pain?" A. "No, sir, not necessarily, no, sir."

RE-DIRECT EXAMINATION BY MR. E. H. COULTER:

When Duncan visited the hospital on June 28, and thereafter, he did not have the normal use of his

limbs, but that was due to pain and not paralysis.

Q. "From the examination you made of this patient and the history of his case, is it your opinion that the injury you found in the lower region of his spinal column was due to recent injury?" A. "Yes, sir." Q. "In other words, that could not be due to any injury received as far back as March?" A. "No, sir, if it had been that far back, he would have been totally disabled then." Q. "I will ask you if this curative work which you think will be necessary before any improvement is noticed is of a serious nature?" A. "Yes, it is."

RE-CROSS EXAMINATION BY MR. CHOWNING:

I have the record of Duncan's first visit to the hospital in March, but I did not see him at that time. He was seen by Dr. Ogden, Jr. The diagnosis at that time showed pain in the right sacro-iliac region, that is the joint between the sacrum and the hips.

Q. "That is pretty close to his present trouble, isn't it, Doctor?"

A. "No, his pain now is in there; his pain now is down in the sciatic nerve." Q. "Now, can you get a pain in the sciatic nerve by having a sprain in the sacro-iliac?" A. "Yes, you can, but his pain on that first, on this March item, the pain was in the ligaments around the sacro-iliac joint and Doctor Ogden, Junior, injected this, yes, injected them and stripped him with adhesive." Q. "He made the same sort of injection at that time and for that that you later made at a later date?" A. "Yes, sir, many of these treatments, I want to be clear on this, many of these treatments from June up to the present time, some of them were done by Doctor Ogden, Junior, and some by myself; we both saw the case alternately, and they were not all my own personal treatments; I related it in here as if it were but both of us saw him." Q. "You testified as to your records?" A. "Yes, sir." Q.

"And your records show what was done?" A. "Yes, sir."

The solution injected into the spinal canal was an oil with iodine salt in solution. Some individuals are allergic to iodine, and there is sometimes an abnormal reaction to that injection. In such cases, you would get the symptoms of iodine poisoning. I did not notice any of these symptoms in this case.

STIPULATION: Here the parties stipulate that the hospital and medical bill of plaintiff due to the witness, and to Trinity Hospital, to this date, is $950.00.

LUTHER DUNCAN, the plaintiff, being recalled, further testified as follows:

RE-DIRECT EXAMINATION BY MR. E. H. COULTER:

Q. "Mr. Duncan, there has been some testimony here about the fact that you did certain work in the store of the Montgomery-Ward Company; I will ask you if that is correct?" A. "Yes, sir." Q. "Under whose direction did you do that work?" A. "Mr. Smothers." Q. "Did Mr. Santee ever give you any instructions about what you were to do in the store?" A. "No, sir." Q. "Did you know Mr. Santee at the time you first discussed your employment with Mr. Smothers and Mr. Greco?" A. "No, sir." Q. "Who paid for that work?" A. "Well, the girl there in the office, up there at Montgomery-Ward & Company." Q. "Who agreed with you on what you were to receive?" A. "Mr. Greco." Q. "Was that matter ever discussed at any time between you and Mr. Santee?" A. "No, sir." Q. "Who directed you where, or were you directed by anyone, to take the ice box to Greenbriar, Arkansas, about June the 26th or 27 of last year?" A. "Mr. Smothers." Q. "Who went with you on that trip?" A. "Jake

Jackson." Q. "Were you on this truck that was described this morning that had the van body on it?" A. "Yes, sir." Q. "Do you have an idea of about how much that ice box would weigh?" A. "Well, I think I have an idea; I don't know exactly." Q. "Just give us your approximate idea." A. "Well, it would weigh anywhere from 350 to 400 or 450; I don't know what that one would weigh." Q. "Do you remember the name of the gentleman to whose store you took that box?" A. "Cantrell." Q. "J. O. Cantrell?" A. "Yes, sir." Q. "He is a merchant at Greenbriar?" A. "Yes, sir." Q. "Where did you unload that ice box?" A. "Well, we unloaded it on the back porch, kind of on the south side of the store."

Q. "This van, did it have an end gate at the back of it, or the bed of the truck?" A. "Yes, sir." Q. "When you let that down, would it be level with the floor of the truck bed?" A. "Yes, sir." Q. "Did you let it down on this particular occasion?" A. "Yes, sir." Q. "I believe you say you had backed the truck up to the porch?" A. "Yes, sir." Q. "Now, I will ask you if, when you let the end gate down, it came down as high as the porch floor, or if it was lower or higher than the floor?" A. "It was higher." Q. "About how much would you say?" A. "Well, I judge it was ten or twelve inches higher."

Q. "I believe I will just ask you to state to the jury in your own way what happened when you began to unload that box, just what took place there; just state it in your own words." A. "Well, first, when we went in, we parked in there and asked the fellow where he wanted the box, and he told me that there was a porch around there I could back up to and I went in and got in the truck and drove around and backed up and let the tail gate down, and it was that much higher than the porch, and me and Jake went in there and got the ice box and when I reached down to get it I would say, 'Alright'; and we would always give the signals because that box was between us; and

we edged it back to the end gate and I hollered, 'Hold it Jake, take it easy; I am stepping down;' and as I stepped down he kind of raised it up a little bit and threw a little weight on me and I went down, as I was stepping down."

Q. "He tilted the box over towards you?" A. "Yes, sir." Q. "It did not fall on you?" A. "No, sir." Q. "What did you do then?" A. "I hollered, 'Set it down, Jake'; I was going down and I hollered to him to let it down, let the box down, and all right there." Q. "Was there anything said there at that time about what happened?" A. "I told Jake, 'I can't do any more; I hurt my back' and I told him—." Q. "Was there anybody else out there at that time?" A. "No, sir." Q. "Was there very much said about the situation at that time?" A. "No, sir, there wasn't anything said, only I told Jake that I hurt my back." Q. "Did you have any idea at that time you were seriously hurt?"—A. "Well, I didn't have any idea that I was as seriously hurt as I was."

Some other people came and assisted in setting that box in the store. Jake tilted it over, and slewed it off the tail gate onto the porch, and then we dragged it on part of the way, and I got hold and gave a push and he was kind of tilting it along, and I kind of helped all I could; I was holding my back with one hand and pushing with the other, and two more men came up and helped us; I don't know who they were. "I was a stranger there."

I drove the truck back to town. We got back just about three or four o'clock that afternoon.

Q. "Did you go out on some deliveries then?" A. "Yes, sir." Q. "Was your back still hurting when you got back to town?" A. "Yes, sir; I could hardly stand it." Q. "Was it hurting worse or less?" A. "Yes, sir, it was hurting worse I think." Q. "Did you report for work the next day?" A. "Yes, sir." Q. "And what happened?" A. "I went over

for the truck, and I was kind of drawed over in that kind of a shape, and I went out and got the truck and picked up another colored boy to do the lifting, because I couldn't, and I went to the store and picked up a bed room and a living room suite and carried them out on Park Hill, and I was hurting so bad I told Jake coming back I would have to give it up. When I got back to the store Jake always got out and let the tail gate down and I backed up to the door, and I opened the door of the truck and just skidded my feet down, let them to the ground, and my feet went out from under me, and the glass was down in the window, and I caught my arm and kind of hung on, and Jake came around running up and helped me until I got the use of my legs, and kind of got around the door and got hold of the bannisters." Q. "Then what did you do?" A. "I got on the elevator and went up to the second floor and told Mr. Greco I hurt my back, and I could not 'take it' any longer." Q. "Did you go home?" A. "Yes, sir." Q. "How did you get there?" A. "Well, they carried me over to where my car was and I went and got in it and went on home." Q. "How long after that before you went to the hospital?" A. "That afternoon." Q. "That was the 28th of June, I believe?" A. "Yes, sir." Q. "It was the next day before you were treated there at the hospital?" A. "Yes, sir." Q. "They didn't strap you up?" A. "Yes, sir." Q. "And gave you an injection?" A. "Yes, sir."

Q. "Had you ever had any trouble with your spine in that region prior to that time?" A. "No, sir." Q. "What had been the condition of your health up to that time?" A. "I was healthy; I never was sick in my life." Q. "How much did you weigh at that time?" A. "I weighed anywhere from 165 to 170." Q. "What do you weigh now?" A. "150."

Q. "You did not hear Dr. Ogden's testimony?" A. "No, sir." Q. "Do you suffer pain now?" A. "Yes, sir." Q. "Constantly?" A. "Constantly, all

the time." Q. "What part of the time do you remain on the bed?" A. "All of the time." Q. "Why do you do that?" A. "Because I can't stay up."

RE-CROSS EXAMINATION BY MR. CHOWNING:

Q. "Now, this store at Greenbriar, Arkansas, where you took the ice box was a small country store, and it had an unloading platform on the back; is that right?" A. "Well, I don't know whether you call it an unloading platform or not, there was a porch around there." Q. "An uncovered porch?" A. "Yes, sir." Q. "It was not as high as the floor of the truck?" A. "No, sir."

Q. "Now, Mr. Duncan, did you back the truck up against the platform before you started to unloading?" A. "Yes, sir." Q. "Did you have the end gate of the truck extending over the edge of the porch?" A. "Yes, sir, it was like this was the edge of the porch right here (indicating), while the truck was backed up this way, and the tail gate was backed up over the edge of the porch." Q. "Well, the body of the truck was high enough to clear the porch entirely?" A. "The tail gate after it was let down." Q. "I mean the floor too?" A. "Yes, sir." Q. "The end gate would lie down and was level with the floor of the truck bed?" A. "Yes, sir." Q. "And you could back up against that low porch with this bed here, the rear wheels would be considerably forward from the back end of the truck?" A. "Yes, sir." Q. "And you could back up until the wheels struck the unloading porch or unloading platform, couldn't you?" A. "Yes, sir." Q. "That would have been not only the end gate extending up over the porch but would actually have had the back end of the truck extending over the porch, wouldn't it, there would have been an overlapping there?" A. "Yes, sir."

Q. "Now in this case was the end gate dropped down so that it was level with the floor of the truck, or did you just unloose the chain and drop it down

completely?" A. "No, sir, we hooked it up level with the floor." Q. "And you had it level with the floor of the truck?" A. "Yes, sir."

Q. "Now, you first pulled the ice box out; you and Jake pulled the ice box out to the edge of the truck bed and had opened the end gate before you attempted to take it down to the porch; is that right?" A. "Well, we picked it up in the front end of the truck and carried it back." Q. "Now you just said you set it down on the end gate, didn't you?" A. "No, sir, I didn't set it down until I hurt my back and had to set it down." Q. "You didn't set it down and then step down on the porch, but you were still carrying it?" A. "Yes, sir." Q. "In other words, you went back up here to the front end of the truck where you had the ice box fastened inside of the truck body, you would always fasten them so they won't tilt over?" A. "Yes, sir." Q. "You unloosened it and you and Jake lifted it, you were on one side and I presume you were down at the legs?" A. "No, sir; we were on the —we were not on the bottom—there were little pans that fastens in there, and you take that out." Q. "Sort of a handle?" A. "Yes, sir." Q. "What you attempted to do was to carry the ice box in one continuous operation from the truck, the front of the truck, on out the back end of the truck, on past the end gate and step down to the floor of the porch while you were carrying the ice box?" A. "Yes, sir." Q. "And while you were doing that you say that Jake tilted up the box too much on the other side. Now, when did Jake do that, Mr. Duncan; just at what point?" A. "Well, just as I stepped down. I was trying to hold it on a level with him, you see." Q. "Yes." A. "And just as I stepped down, Jake, he raised it." Q. "Was Jake stepping down at the same time you were?" A. "No, sir, I was backing up and he was coming forward." Q. "Oh, you mean you were backing out?" A. "Yes, sir."

Q. "Now the truck was wide enough for you

all to carry it this way?" (Indicating.) A. "No, sir. It was wide enough, but it had a piece in here with extensions up for the wheels." Q. "Yes, sir, but when you got out here on the end gate these extensions were back yonder inside the truck body?" A. "Yes, sir, sure." Q. "They are not in your way after you get out on the end gate?" A. "No, sir." Q. "But it would have been possible for you and Jake to have turned the ice box around so that both of you were facing towards the porch, could have stepped down at the same time, at the same moment; that is right?" A. "You could have done that, yes, sir." Q. "You could have?" A. "But your refrigerator would have hit the tail gate before you got down." Q. "What do you mean 'Hit the tail gate?' " A. "Stepping off, both at once, it is a bad policy." Q. "Wasn't it a better policy to step down both of you at once than for you to back down off the truck which would put you on the lower platform at the same time that Jake was still up some ten or twelve inches higher than you; wouldn't it make it necessary for you to lift some ten or twelve inches higher on the box in order to keep the box level? Wouldn't that be true?" A. "I don't think so." Q. "So what you were doing was to back out of the truck onto the end gate backwards and then step down from the end gate to the porch, still backing?" A. "Yes, sir." Q. "And Jake following you over yonder?" A. "Yes, sir."

Q. "Now, Mr. Duncan, when you and Jake went out on that truck to make the deliveries, Jake took all of his orders from you didn't he?" A. "Yes, sir." Q. "He was absolutely subject to your direction and control, and Jake did just what you told him to do, didn't he?" A. "Yes, sir."

Q. "Now, if you had a delivery to make of a lot of objects, it was customary for you to stay in the truck and send Jake in with it, wasn't it?" A. "No, sir." Q. "Well, suppose that you were going to deliver to a certain address a water bucket, or just a small object of that kind, who went in the house

with it?" A. "I did." Q. "And you left Jake in the truck?" A. "Yes, sir." Q. "Well, if you had told Jake to take it in, he would have done it, he would have taken it in?" A. "Well, I suppose he would." Q. "He did just exactly what you told him to do and always did it willingly and cooperated with you, didn't he?" A. "Yes, sir." Q. "Now, there was nobody else on this truck to boss Jake besides yourself at the time you were making these deliveries, was there?" A. "No, sir."

Q. "After you got hurt up there, hurt delivering that box, you just came back to the store and you told Mr. Greco that you were not going to be able to go ahead with your work, and later that day or the following day you told Mr. Santee you were going to have to quit, didn't you?" A. "No, I didn't tell anyone until the next day, when I did have to quit." Q. "You did?" A. "I told Smothers that day not to give me anything heavy, I couldn't handle it." Q. "You told Mr. Santee the following day that you were going to quit?" A. "No, sir, I didn't tell Mr. Santee nothing; when I got back from that delivery on Park Hill I told Mr. Greco; that's the only one I told." Q. "You never did tell Mr. Santee that you were going to quit?" A. "No, sir." Q. "Did you ever see Mr. Santee after you quit?" A. "Yes, sir." Q. "When did you see him?" A. "I seen him that afternoon when I was going out to the hospital." Q. "Did you tell him that you had quit?" A. "No, sir." Q. "What day was that?" A. "That was the 28th; that afternoon." Q. "And you did not tell him that you were quitting?" A. "No, sir." Q. "Why didn't you?" A. "Because he didn't hire me, and I didn't think that he was anybody for me to be telling him that I was quitting."

Q. "You thought that because Mr. Greco got this job for you and paid you all that time you were working for the Montgomery-Ward and Company?" A. "Yes, sir, sure did." Q. "When you first came

up there and applied for this job, what kind of different jobs did you talk to Mr. Greco about, what kind of work, Mr. Duncan?" A. "Well, I didn't inquire for any one certain kind, only just told him that I heard he was going to have a vacancy."

Q. "When did they tell you out at Trinity about the needle being broken off?" A. "They told me the day they broke it off in there."

Q. "Your trouble you are having now, your feet trouble, is in your right hip and leg?" A. "Well, it starts right up in here and goes down kind of out along down side in there." Q. "Does it start about where you can feel your hip joint there?" A. "No, sir, it starts on up there, right back in your back." Q. "In the small of the back?" A. "Yes, sir." Q. "And runs down the hip and leg?" A. "Yes, sir." Q. "In the back of the leg?" A. "Yes, sir, kind of in the side." Q. "You felt this pain in your back at the moment you stepped down from the end gate to the little porch, didn't you, Mr. Duncan?" A. "Yes, sir." Q. "And the minute you felt that pain you had to let down the ice box?" A. "Yes, sir." Q. "Now you were working from the side of the box, you were lifting from the side?" A. "Yes, sir." Q. "And Jake had the other side?" A. "Yes, sir." Q. "Now, when the box went down, you just let it down to the porch floor, I presume?" A. "Yes, sir." Q. "And one part of the box was still up on the end gate; did that leave the bottom of the box still on the end gate?" A. "At the time I let it down?" Q. "Yes." A. "Yes, sir, I was just off the end gate; I said, 'Down, Jake', and it hit me, and I—" Q. "But that would have left two legs down here and two up there?" A. "No, sir, the whole ice box was on the end gate." Q. "It was?" A. "Yes, sir."

Q. "Do you want to rest awhile?" A. "Yes, sir."

MR. CHOWNING: "Alright, let's do that then."

(Here the court recessed for five minutes.)

LUTHER DUNCAN, the plaintiff, being recalled, further testified as follows:

RE-RE-DIRECT EXAMINATION BY MR. E. H. COULTER:

Q. "Mr. Duncan, what literary training have you had; in other words, what schooling?" A. "Just only the 8th grade." Q. "Public school?" A. "Yes, sir." Q. "Have you ever been trained to do any type of work except manual labor?" A. "No, sir."

Q. "What were you earning at the time you were injured?" A. "Well, $15.00 a week." Q. "What had you been earning on an average for several years prior to that time?" A. "Well, it had varied; four years work down there at the Merchants from $13.00 to $14.00 and some $23.00 and $24.00, and I have drawed as high as $24.00."

Q. "Was this the first of these ice boxes that you and Jake Jackson had moved after you went to work at Montgomery Ward and Company?" A. "No, sir." Q. "Had you moved several at the Merchants?" A. "Yes, sir." Q. "And had you moved several at Montgomery Ward and Company?" A. "Yes, sir." Q. "Had Jake Jackson helped you?" A. "Yes, sir." Q. "Did you always talk your signals?" A. "Yes, sir." Q. "Had he always observed these signals prior to this time?" A. "Yes, sir, he was always very careful." Q. "Did he observe them on this occasion?" A. "No, sir." Q. "That was the first time that he had ever failed?" A. "Yes, sir."

Q. "How high would you say that Jake raised that box at the time that it was tilted over towards you?" A. "I would not be exact, well, it was something like this, six or eight inches, something like that." Q. "He had just got out from under the door of that van body, had he not?" A. "Yes, sir." Q. "That was not high enough for a man to stand up straight under, is it?" A. "No, sir." Q. "Was the

box tilted over towards you considerably when he raised it?" A. "Yes, sir."

E. L. SANTEE, witness on behalf of plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. E. H. COULTER:

I live on Route 3, Hot Springs Highway, Little Rock, and have lived in Little Rock or vicinity since 1931. I am engaged in the transfer business. I know Luther Duncan, the plaintiff in this case.

Q. "Did you employ him in 1938?" A. "No, sir, I did not." Q. "He drove a truck for you?" A. "No, sir." Q. "When was the first time you ever knew Duncan?" A. "Well, there was a—the middle of June he had worked at the store one day and I met him on the second." Q. "You mean, when you say 'the store', you mean Montgomery Ward & Company?" A. "Yes, sir." Q. "Did you have anything to do with hiring him to work there?" A. "No, sir, I did not." Q. "Did you know when he was hurt?" A. "No, sir." Q. "When he was hired?" A. "No, sir." Q. "Did you have anything to do with fixing the amount of his pay?" A. "No, sir." Q. "Did you have anything to do with directing him as to what he was to do when he was on duty for Montgomery Ward & Company?" A. "No, sir, only to, the second day I advised him where to buy gas." Q. "It is a fact that you were the owner of the truck, isn't it?" A. "That is right, yes, sir." Q. "Had you ever known Duncan prior to that time?" A. "No, sir, I never had even heard of him."

Q. "Do you know Jake Jackson?" A. "Yes, I do." Q. "Do you know whether or not Jake was working over there at that time or not, at Montgomery Ward and Company?" A. "Yes, he was." Q. "Did you hire him?" A. "No, sir, I did not." Q. "Do you know who did hire him?" A. "No, sir, I couldn't say who hired

Jake." Q. "Were you ever told by any of the employees of the Montgomery Ward and Company that he had been hired by them?" A. No, I just don't know how Jake ever got to work." Q. "Did you ever give Jake any instructions about what he should do over there?" A. "No, sir." Q. "Do you know how long Jake Jackson had been working over there before you ever knew anything about him at all?" A. "No, I do not." Q. "And you do know it to be a fact that he was placed on this truck you actually own?" A. "Well, I saw him on the truck." Q. "Did you have anything to do with what helper was placed on that truck?" A. "No, sir, I did not." Q. "Who controlled that, Mr. Santee?" A. "Well I couldn't say; I didn't have anything to do with it, and so I don't know who took the power to handle that." Q. "You do know somebody over at Montgomery Ward and Company controlled that?" A. "Somebody did, and I didn't." Q. "You don't know which of them?" A. "No." Q. "Do you know what markings, if any, that truck had on it?" A. "It had Montgomery Ward and Company on the side and 'phone number, Little Rock, Arkansas, I believe, or Little Rock." Q. "Was it used for any other purpose at all except in the business of the Montgomery Ward and Company between the 13th of June and the 27th of June?" A. "No, sir, it did not, that I know of." Q. "What I am getting at is did you use it in any of your transfer and trucking business?" A. "No, sir."

I recognize the kodak picture that is handed to me as being a picture of the body of that particular truck that was in use at the time the truck was being used at Montgomery Ward & Company between June 13 and June 27, and identify the same as Plaintiff's Exhibit No. "1" to my evidence (said exhibit is introduced in evidence, filed, identified as Plaintiff's Exhibit No. "1", and appears at the close of all the evidence herein). I also identify the second kodak picture that is handed me as being a picture of the same

body with the doors opened, and make the same a part of my evidence as Plaintiff's Exhibit No. "2" (said exhibit is introduced in evidence, filed, identified as Plaintiff's Exhibit No. "2", and appears in its regular order at the close of all the evidence herein).

STIPULATION: Here it was stipulated between the parties that the negro boy who appears in Exhibit No. "2" was standing on the end gate when it was in a horizontal position with the bottom of the truck bed.)

The dimensions of the truck bed are as follows: inside width, 5 feet 6 inches; inside height, 5 feet 9 inches; length, 9 feet. The bars (rafter or supports) bring the height down to 5 feet 4 inches. The bottom of the truck bed was 43 or 44 inches above the ground.

CROSS-EXAMINATION BY MR. CHOWNING:

At the time Duncan received his injury on June 27, 1938, there was in existence a trucking contract between me and Montgomery Ward & Company which both of us had signed. I identify the document exhibited to me as this agreement. (Here the defendant offered said contract in evidence. Plaintiff objected to its introduction on the ground that said contract would not be competent against plaintiff until notice of its existence was brought home to plaintiff. The objection was overruled and said contract was identified and introduced as Defendant's Exhibit No. "1". Said exhibit, however, is not attached, since, on motion of plaintiff, the same was later excluded by the court on the ground that the evidence showed the contract had been abandoned prior to the date of plaintiff's alleged injury.) The contract provided for two trucks. Later I was advised by Mr. Greco that one truck would be sufficient to do the work, and I took one truck off. At that time, my compensation was reduced from $75.00 to $50.00 per week. There was another contract rewritten for a period of two months, January and February, 1938. I do not have the new contract with me but will bring it when I come to court in the

morning. (It was here that the motion of plaintiff to exclude the original contract was granted). After that "it automatically went back to this contract." At the time Duncan received his injury in June, we did not necessarily treat this contract as being in force. We partly continued under this contract from March forward and partly we didn't; "it was never lived up to after the first of March. * * * Along the middle of March Mr. Greco began to change his drivers." J. D. Parker, who was the first driver under this contract, was working for me at the time this contract was entered into. I put him on the job. Mr. Greco complained about all the drivers not making deliveries right.

Q. "He complained about every one of them, did he?" A. "Yes, he did." Q. "Now Parker worked on this job, in complaining about it he just complained that your drivers were not giving proper delivery service under this contract, didn't he?" A. "Well, there was always some disturbance between he and I about it." Q. "Now just tell us what this disturbance or these disturbances were?" A. "Well, they were either getting there thirty minutes late or not working up until ten o'clock at night." Q. "Now under this contract, it was contemplated that you would make these deliveries, all deliveries that Wards had to make in your territory?" A. "During store hours." Q. "Does it say anything about that in the contract?" A. "I think it does." Q. "In this contract here?" A. "If it is not in that one, it is in my other contract." Q. "In the one of January and February, 1938?" A. "Yes, sir."

I took Parker off the truck in September, 1937, because Mr. Greco advised me to. I then employed Keatts who worked until March, 1938.

Q. "Now you let Keatts go because Mr. Greco wasn't satisfied with the delivery service?" A. "Mr. Greco claimed, he called me up one evening, and he

said that 'this will be the last day for Mr. Keatts on the truck.' " Q. "That is right, the last day for Mr. Keatts?" A. "Yes, sir, that was along about five o'clock in the evening." Q. "What did he say?" A. "He says, 'I have got a man that will take it over in the morning.' " Q. "He had complained to you about Keatts' work before that?" A. "Yes, sir, he had." Q. "He told you that he wanted another driver to handle these deliveries?" A. "Yes, sir." Q. "And in talking about getting another driver with Mr. Greco you had asked Mr. Greco if he had any suggestions as to a driver, didn't you?" A. "No, I had a man picked out for the job." Q. "Now Cain succeeded Keatts on this job?" A. "Yes, sir." Q. "You knew Cain, didn't you?" A. "Yes, sir." Q. "He had been at one time an employee of the Montgomery Ward and Company there in the store?" A. "Yes, sir." Q. "And worked as a shipping clerk?" A. "Yes, sir, worked in the shipping department." Q. "Now when Mr. Greco complained to you about Keatts you already were talking about another driver, and didn't Mr. Greco suggest to you that he thought that Cain would be a good man for the job?" A. "No, sir, he did not." Q. "Now what are the facts about that?" A. "He first told me he was going to put a man on." Q. "Did you acquiesce in that?" A. "No, I suggested another man, and he said 'From now on I am doing the hiring.'" Q. "He was going to hire him?" A. "Yes, sir." Q. "Cain went to work on the truck?" A. "Yes, sir."

Parker was paid by me, and I made arrangements with the cashier at Montgomery Ward's to pay Keatts.

Q. "You made arrangements for her to take from your compensation, your weekly compensation under this contract, the amount to be paid your driver and helper on the truck and whenever he came around he got that money and the difference was paid to you?" A. "Well, at that time there was no helper." Q. "You mean one man was making all the deliveries?" A.

"Yes, sir, if they had any helper I didn't know anything about it." Q. "Now along about that time it was suggested to you in order for that service to be done properly you were going to have to have a helper on that truck?" A. "Yes, sir." Q. "You complained to Mr. Greco, you said, 'I am only getting $50.00 a week under this contract now and I can't afford to pay another driver', I mean another man, a helper, so Mr. Greco said, 'Well, if you will put another man I will pay you $52.00 a week, instead of $50.00, and you pay for the helper $4.00 a week,' is that right?" A. "No, sir, that wasn't the way it was." Q. "Alright, state how it was." A. "Cain had had a man on there for some time that I didn't know anything about, but I did see a colored man on there for two or three weeks, but I didn't say anything, because it wasn't costing me anything. So finally, one day I was four dollars short and I refused to check him up at that time until I saw what the shortage was. And I talked to Mr. Greco and he said that this man had to have a helper and I said, 'I am not getting enough out of it to hire any helper; I can't afford to pay one.' Then he said, 'I will pay $2.00 and I will deduct it from your pay and pay the man $4.00 a week;' there was nothing else to do but to take it at that particular time." Q. "Now $4.00 a week was deducted plus the $15.00 a week for the driver of the truck, wasn't it?" A. "Yes, sir." Q. "You were paid the difference?" A. "Yes, sir." Q. "And you asked as a favor to you, the cashier at the Montgomery Ward and Company, after you had paid them for awhile, the drivers on your trucks, you asked her as a courtesy to you, since Ward's custom was to pay their employees every Friday, you told her that would be convenient if she would just advance the money in these two amounts, these two men's wages on Friday to them and then you would come around on Saturday and get the balance due you under the contract and she could deduct that—" A. "I did with Mr. Keatts." Q. "Did you do that before Mr. Keatts quit driving the truck?" A. "No, sir." Q. "Well, then I didn't under-

stand your explanation." A. "When Mr. Keatts went to work I instructed him to pay him." Q. "Well the same arrangements continued on after Keatts left?" A. "No, sir, when Cain went to work Mr. Greco changed it and paid the men on Friday and told me about it, he said, 'From now on—' he paid them as he did his own people on Friday instead of Monday." Q. "The only change was they kept paying your men on Monday instead of on Friday?" A. "The only change he made was he raised the wages of Mr. Cain without my authority." Q. "What raise did they give Mr. Cain without your authority?" A. "Three dollars a week, two dollars a week." Q. "What were they paying him?" A. "Started in at $13.00 and finished at $15.00 a week." Q. "You say that they, without your consent, without your authority, the contract was so written that you could have terminated it at any time under its terms?" A. "Yes, sir." Q. "You agreed to these raises, didn't you?" A. "Well, at that time I was in bad need of work, and I had to put up with most anything to get along." Q. "You elected to do that rather than to terminate the contract?" A. "What revenue I could get I needed it." Q. "Now, Mr. Santee, after you took that truck off up there at Montgomery Ward and Company, incidentally, the contract specified you were to furnish two men and two trucks; that was the agreement, wasn't it?" A. "Yes, sir." Q. "And when you say they had to pay a helper on that one, that wasn't any more than the contract calls for?" A. "The contract did not call for a helper." Q. "It called for two men?" A. "Yes, sir, and two trucks."

Q. "Now Cain told you that he was going to quit, didn't he?" A. "Yes, sir." Q. "And when Cain told you that he was going to quit the matter of getting another driver was again discussed with Mr. Greco, wasn't it?" A. "It was not with me." Q. "Well, you let Mr. Greco understand that he could get another man and put him on; was that your understanding?" A. "No, sir." Q. "Well how were you going to put the man on there to take Cain's place?" A. "I al-

ways have a man or two extra to take his place I could put on." Q. "You still had Parker?" A. "Yes, sir." Q. "What other white man was in your employ?" A. "A man named Mr. Rutledge and Mr. Waite."

Q. "You say that you did not have any conversation at all with Mr. Greco about Mr. Duncan?" A. "Not until after he went to work." Q. "You knew that he would do that work on the truck the next day after he went to work?" A. "The second day, yes." Q. "He worked one day and the second day of his employment you knew that he was on the truck?" A. "Yes, sir." Q. "And you, Mr. Greco talked to you about him, and told you that he was a man that had come to him looking for work and had filed an application with him for work some days before that and when Cain was going to quit work on that truck he thought he would be a good man to drive for you, didn't he?" A. "After he had worked the second day I went to the store and complained about it." Q. "What did you complain of?" A. "I complained I had my man to put on the truck; that the last driver he hired cost me—caused me to lose several hundred dollars, and I said, 'From now on I am going to put my own men on it', and he said, 'No, I am putting my man on there and I am paying him $15.00 a week.'" Q. "That is what you had been paying Cain?" A. "Yes, or he paid him, rather." Q. "You did not object to that, did you?" A. "Yes, I did object, yes, I wanted to put my own men on there to keep the truck from being torn up." Q. "Well, you could have told Mr. Greco you were not going to agree to put Duncan on to work, couldn't you?" A. "Well, I would have if I could have but I would have gotten thirty days notice to get off the job, and I needed the revenue." Q. "You were afraid the contract would be abrogated and for that reason you agreed for Duncan to go ahead?" A. "I didn't agree; I went ahead." Q. "You acquiesced and went right on taking the balance of the money

under the contract?" A. "I did take the balance, yes."

Q. "Now after Duncan got hurt, when did you see him next, Mr. Santee?" A. "I seen him that afternoon." Q. "Then you put whom to driving the truck?" A. "Well, some one called me from the store that they needed a driver down there right away." Q. "And whom did you send?" A. "I sent Mr. Parker there for the balance of the day, and next day I hired Mr. Waite." Q. "And Mr. Greco didn't object to that, did he?" A. "No, sir." Q. "And this last man that you put on continued to drive the truck until the contract terminated?" A. "No, sir, he worked two weeks until Mr. Greco became dissatisfied with my man again and then he hired another one and called me and said, 'I am putting a new man out there in the morning.' " Q. "Who was that?" A. "Mr. Dorris, if I am not mistaken." Q. "Then Dorris continued to drive under the same conditions as the other drivers had driven?" A. "Yes, sir." Q. "How long did Dorris drive?" A. "Long enough to buy another truck and take my contract." Q. "What do you mean by that?" A. "A thirty days' notice was served soon after he went to work." Q. "You mean that Dorris has the contract now with Montgomery Ward and Company?" A. "Yes, sir."

RE-DIRECT EXAMINATION BY MR. E. H. COULTER:

I never did show this contract to Luther Duncan. I never did discuss it with him.

Q. "Did you ever discuss with Luther Duncan in any manner the control or relationship that existed between you and Montgomery Ward and Company?" A. "No, sir, I did not; I had no right to." Q. "Now I believe you say this was dated about the given date, the 17th day of May, 1937, and provided you should furnish two trucks and a driver for each truck; how long did you operate under this contract?"

A. "That was made the 17th of May, and about the fifth or sixth day of July the same year." Q. "1937?" A. "Yes, sir." Q. "In other words, nearly a year before Duncan started working down there this contract was abandoned?" A. "Yes, sir." Q. "And you say you made another contract that was to cover January and February 1938?" A. "Yes, sir." Q. "Alright, that contract, I understood you to say, provided that upon its expiration you should return to this contract which provided for two trucks and two drivers?" A. "Well, there was a clause in there, that is the meaning of it." Q. "Did you ever return to this contract?" A. "Well, we never mentioned it; at the end of two months we went back to the old pay of $50.00 a week." Q. "You never did get back to this contract?" A. "It wasn't mentioned, I mean." Q. "You never did furnish two trucks and two men?" A. "No, sir, only the latter part of '37 they needed another truck and I sent one down." Q. "But after that you never did get back to furnishing the two trucks provided for in the contract?" A. "Unless maybe one month they would need a truck to go out of town and I would send one." Q. "That was just an extra trucking proposition?" A. "Yes, sir." Q. "You never did get back on the $75.00 basis?" A. "No, sir."

Q. "I believe you said that neither one of these contracts ever provided that you were to employ a helper?" A. "No, sir, it never did." Q. "Did you ever employ a helper to work on these trucks?" A. "No, sir." Q. "Do you know how long Jake Jackson had been working there before you knew him?" A. "No, sir, but I saw him on the truck a couple of weeks, and didn't ask any questions." Q. "I understood you to tell Mr. Chowning that an argument came up, that you entered into an agreement there or at least they made the proposition which you may have acquiesced in that he would pay $2.00 on that and raise your pay from $50.00 to $52.00 a week, and take two of it back from you?" A. "Yes, sir, that's right." Q. "So that

in fact and reality Jake didn't cost you a penny?" A. "Yes, sir, he cost me $2.00." Q. "You got a raise of $2.00 and they took four off?" A. "Yes, sir, they took four, deducted four dollars."

Q. "Who employed Cain?" A. "Well just like I said, the arrangements were all made when I got to the store that evening, about five o'clock, he told me to put Keatts off, that he would put Cain on there in the morning." Q. "Did you know Cain at that time?" A. "Yes, I did." Q. "Was that satisfactory to you?" A. "No, it was not." Q. "I believe you said you objected?" A. "Yes, I did." Q. "Now I believe you say Cain wrecked your truck?" A. "Yes, he did." Q. "Do you remember that you tried to fire him at that time?" A. "I did." Q. "What did Mr. Greco say?" A. "He objected." Q. "Did you get him fired?" A. "Not until he quit." Q. "And Cain stayed on the job?" A. "Yes, sir."

Q. "Now this man Waite that you sent up there after Duncan was there, why he was the very fellow you wanted to put to work when they hired Cain?" A. "Yes, sir." Q. "And Greco would not have him?" A. "No, not when he hired Duncan." Q. "That is when he hired Duncan?" A. "Yes, sir." Q. "And Greco wouldn't agree to that?" A. "No, sir." Q. "And put Duncan to work?" A. "Yes, sir." Q. "I believe you say you never had known Duncan up to that time?" A. "Never had seen him until the second day he worked."

MRS. DOROTHY MAY DUNCAN, a witness on behalf of plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. E. H. COULTER:

My name is Dorothy May Duncan. I am the wife of Luther Duncan. I have lived with him five years last August. I have been at home all of that time. Mr. Duncan has been regularly employed since our

marriage up until the date of his recent trouble. I think he was in perfect health during these first years. He was never sick, only a bad cold. I remember the time that has been referred to here when he strained a muscle in his right side. He was away from his work two or three days. He went to the hospital for an examination.

I don't believe he has been clear of pain at all for the last six or eight months. Some of the nights he sleeps well and others he can't—sometimes he hurts worse than others. Since his trouble came on, when he takes any physical exercise, he gets nervous and shakes all over.

CROSS-EXAMINATION BY MR. CHOWNING WAIVED.

O. W. PETE WIGGINS, a witness on behalf of plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. E. H. COULTER:

I am one of the attorneys for the plaintiff in this case. In the course of my investigation of the case, I made a picture of Mr. Cantrell's store at Greenbrier where the ice box was unloaded. I personally inspected the porch of that store. The picture exhibited to me is one that I made of the porch of that store. I measured the height of the porch floor from the ground. The point from the floor to the highest ground was twenty-seven inches, and the longest point from the floor to the ground was thirty-two inches. I introduce the picture exhibited to me as a part of my evidence, and identify the same as Plaintiff's Exhibit No. "3". (Said exhibit is introduced, filed, and identified as Plaintiff's Exhibit No. "3", and appears in its regular order at the close of all the evidence herein.)

CROSS EXAMINATION BY MR. CHOWNING:

I have known Luther Duncan since August, 1938.

I have represented Mr. Santee in some matters. He conferred with me several times prior to the date Duncan alleges he went to work on the truck as a driver. He thought Mr. Greco was taking too much authority under this contract with Montgomery Ward & Company. Mr. Duncan did not employ me as a result of Mr. Santee's suggestion.

DR. MAHLON D. OGDEN, recalled as a witness on behalf of plaintiff, further testified as follows:

DIRECT EXAMINATION BY MR. E. H. COULTER:

Q. "Dr. Ogden, assuming that we have under consideration as a subject or patient a man 29 years of age; that he has always enjoyed good health; that he has never had any serious disease or illness; that he is strong and robust; that he weighs around 170 pounds; that he has been regularly engaged for a number of years in performing physical or manual labor; that there is no history of any previous serious injury to his back or spine; that he is engaged, with another person, in lifting or carrying a heavy load, or a mechanical ice box weighing 400 to 500 pounds; that the other person unexpectedly raises his side of the load, casting an additional and unexpected weight on the subject or patient; that the subject immediately experiences pain and discomfort in the region of the fourth and fifth lumbar vertebrae; that he is still able to go about light tasks for several hours; that he then, and within the period of the following day, develops an acute soreness and pain in the spinal region indicated; that the pain in his lower limbs becomes so acute that he is unable to use them in the usual and normal manner; that he is unable for a time to walk or move around without assistance or support; that he becomes wholly unable to perform his usual manual labors; that an examination within a period of two to four days after the strain or injury mentioned develops an injury or rupture to, and an inward pro-

trusion of, the cartilagenous substance between the fourth and fifth lumbar vertebrae; that such injury or rupture appears to be of a recent nature; that there is no history of any other recent strain or injury; that operations to remove parts of the fourth and fifth lumbar vertebrae and to remove the injured or protruding cartilagenous substance becomes necessary to relieve the strain or pressure on the spinal cord; that relief was not obtained, but that the subject is compelled to recline practically the entire time; that he still suffers such pain, which is greatly increased by any continued activity or sitting up; that he has lost approximately 20 pounds in weight; that he is suffering from what, in medical terms, is known as sciatic neuritis, and that those conditions have existed over a period of 6 to 8 months, and have not responded to treatment:

Then:

1. "What would you say, in your opinion, most probably caused the patient's trouble?"

MR. CHOWNING: "Before the doctor's answer, I want to object, your Honor, to the hypothetical question upon two grounds: First, there is no proof in this record that this ice box weighed from four to five hundred pounds, and in the second place, the hypothetical question fails to take into consideration the presence of the hypodermic needle in the region of the sciatic nerve." THE COURT: "There is testimony that it weighed from four to five hundred pounds, but I—The question of the needle—He can adopt the question." MR. COULTER: "I will amend to meet his other objection." Q. "Then, doctor, in addition to those elements that I have mentioned, assuming further that there is a hypodermic needle in the patient's hip, or a part or a needle some two and a half inches long, that has been there for some two or three months, that was broken off there, some five or six months after the injury described, then, what would you say, in your opinion, most probably caused the

patient's trouble?" A. "The lifting of the heavy ice box or strain." Q. "And what would you say, doctor, further in your opinion, is the probability of recovery of the patient to the extent of his becoming able again to perform regular physical or manual labor?" A. "In my opinion he will not be able to ever perform again heavy manual labor."

CROSS-EXAMINATION BY MR. CHOWNING WAIVED:

Upon the closing of the testimony of witness Ogden, the following proceedings were had:

MR. CHOWNING: "If the Court please, defendant requests a directed verdict in its favor."

THE COURT: "The request is overruled."

MR. CHOWNING: "We save our exceptions and would like to discuss it in chambers."

WHEREUPON, the Court was recessed and the Court, counsel and the reporter retired to chambers, where the following proceedings were had:

MR. CHOWNING: "Your Honor, I am going to take as little time as I possibly can; I am—First, I ask the Court to instruct the jury to direct a verdict for the defendant in this case for the following reasons:

"First: The evidence introduced by plaintiff is insufficient to make a prima facie case and fails to establish the relation of employer and employee as between the defendant and Jake Jackson.

"Second: The evidence considered in its most favorable light on behalf of the plaintiff is insufficient to support any verdict that might be rendered the plaintiff against the defendant.

"Third: The evidence shows as a matter of law that the injury sustained by plaintiff on June 27, 1938, was the result of one of the ordinary risks and hazards of his employment which was open and ob-

vious and known to and appreciated by him, and assumed by him as a part of his employment.

"Fourth: The evidence shows that the plaintiff was a fellow servant of Jake Jackson, that both were the employees of E. L. Santee, and E. L. Santee was an independent contractor under the contract in force between E. L. Santee and Montgomery Ward and Company, providing for E. L. Santee furnishing a driver and helper to make all deliveries for Montgomery Ward and Company."

After argument of counsel, the Court and counsel and the Reporter returned to the courtroom and Court reconvened pursuant to order for recess, when the following proceedings were had:

THE COURT: "The motion for a directed verdict will be overruled."

MR. CHOWNING: "Please note our exceptions."

WHEREUPON, the defendant, to sustain the issues upon its part, introduced testimony as follows:

A. J. LANDERS, a witness on behalf of defendant, being first duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. CHOWNING:

I live at 712 East Fourth Street, Russellville, Arkansas. In June, 1938, I was a salesman for Montgomery Ward & Company. I sold the ice box to Mr. Cantrell at Greenbriar that Luther Duncan and Jake Jackson delivered there. I was present when they arrived with the ice box and while they were unloading it. To the best of my memory, I was standing on the platform near the truck when the box was unloaded. I did not observe anything that indicated that Mr. Duncan had received any injury there at that time. He did not in any act or word indicate that he had received any injury. Mr. Duncan, Jake Jackson and John Hughes were around the store there that day. There were two or three other parties there, but I did

not know their names. Hughes was the service man for Montgomery Ward and Company, and was there to install the box for Mr. Cantrell. As I recall it, Duncan and Jackson stayed until the box was in place in the store, then left immediately. I did not see them any more.

CROSS-EXAMINATION BY PLAINTIFF WAIVED.

J. O. CANTRELL, a witness on behalf of defendant, being first duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. CHOWNING:

I bought the ice box in question, and it was delivered to my store at Greenbriar in June, 1938, by Luther Duncan and Jake Jackson. I did not see the box unloaded. I was somewhere near the front of the store, and did not know the box was being unloaded until it got inside the building. I did not hear any complaint made by Mr. Duncan at the time.

CROSS-EXAMINATION BY E. H. COULTER:

I identify the picture that has been introduced as Plaintiff's Exhibit No. "3" as being the back of my store, the porch where this box was unloaded. The door shown in that picture is the door through which the box was taken into the store. Mr. Landers was there somewhere.

J. L. HUGHES, a witness on behalf of defendant, being first duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. CHOWNING:

I was service manager for Montgomery Ward & Company on June 27, 1938, and went to Greenbriar, Arkansas, on that date to connect an ice box which Mr. Cantrell had purchased from the company. I went there in my car. I really believe I went a little before the truck arrived. I was inside the store at the time the box was unloaded and did not see them unload it. I probably saw Duncan after he came inside

the store. I did not particularly notice. (Here counsel for plaintiff stipulated that plaintiff admitted that he made no comment or complaint to anyone inside the store or to anyone sitting on the porch.) Duncan and Jackson left before I finished installing the box.

CROSS-EXAMINATION BY PLAINTIFF WAIVED.

(Here Court adjourned until ten o'clock on the morning of February 17, 1939, at which time the Court reconvened and the following proceedings were had):

T. R. CAIN, JR., a witness on behalf of defendant, being first duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. CHOWNING:

My name is Taylor R. Cain, Jr. I live at Indianapolis, Indiana. I lived there about nineteen years, and came to Little Rock and worked from May, 1937, until June, 1938. I worked for Montgomery Ward & Company from June, 1937, until November, 1937, of that time. I worked for E. L. Santee from March until June, 1938. I quit in order to return to Indianapolis.

Q. "Now, Mr. Cain, I want you to tell the jury how you came to be employed by Mr. Santee?" A. "Well sir, at the time I was working for Strauss, after I left Montgomery Ward and Company the first time, and when I left Montgomery Ward and Company the first time, I went to work for F. S. Strauss, and I worked there until sometime in March, and Mr. Greco called me one Wednesday evening and I went down there and he asked me if I would like working on the truck, if I thought I could do my work on the delivery truck, and told him I thought I could, and he told me to go and see Mr. Santee, and I did, and he asked me when I could go to work on the truck and I told him just as soon as Mr. Strauss would release

me and I went and saw Mr. Strauss—Mr. Santee the following day and told him, asked him, told him I was going on the truck, I was going to go on the truck, and he accepted and said it was alright for me to go ahead and get my driver's license and I told him I had gotten my driver's license and he said it was alright for me to go ahead and go to work the next day, Friday, and told me to go and get the driver's license and it would be alright, told me where to get the truck." Q. "Now, Mr. Cain, after that day, after you were working on the truck, he was speaking now about your making Montgomery Ward Company deliveries?" A. "Yes, sir." Q. "Who did you take your orders from over there?" A. "From the shipping clerk of the Montgomery Ward and Company." Q. "As to the deliveries?" A. "Yes, sir." Q. "As to the operation of the truck, who did you take your orders from?" A. "Mr. Santee." Q. "Did Mr. Greco at any time try to control the manner in which you handled the truck or driving the truck at any time?" A. "He never dictated, whenever he said anything to me it was just advice, it wasn't no orders, it was just advice." Q. "Or did he ever at any time tell you when you were not working on that truck that you were expected to help at the store?" A. "No, sir, I never did." Q. "I will ask you next, I want you to tell the circumstances of Jake Jackson's employment." A. "Well, all he did was work on the truck." Q. "Who employed him?" A. "I employed him." Q. "At that time you were the driver of the truck?" A. "Yes, sir." Q. "Now, Mr. Cain, did Mr. Greco find any fault, I mean if Mr. Greco, Mr. Santee, did he find any fault with your services as driver of the truck?" A. "He didn't tell me of any."

CROSS EXAMINATION BY MR. E. H. COULTER:

Q. "Mr. Cain, when did you first see Jake Jackson?" A. "Well, sir, I had, about not a month before I quit." Q. "Where was he then?" A. "At the store, behind the store." Q. "Did I understand you to say

that you employed Jake?" A. "Yes, sir." Q. "Do you know who paid Jake his wages?" A. "Yes, sir." Q. "Who did?" A. "It was through Mr. Santee." Q. "No, I didn't ask you that question—" A. "It was the office girl at Montgomery Ward and Company." Q. "Oh, alright, now, I understand you to say that you employed Jake Jackson?" A. "Yes, sir." Q. "Now who told you to do that?" A. "—(hesitates,-- Well, sir, I was told there at the store—" MR. CHOWNING: "I submit, if the Court please, he may have to make some explanation without answering." THE COURT: "He can answer the question and then explain." A. "Well, sir, I will tell you, it come about, I was making, or trying to make—" Q. "Just wait; who told you to employ Jake Jackson?" THE COURT: "You can state who told you, and then explain." A. "Well, one day I was talking—" MR. COULTER: Q. "Who told you to employ Jake Jackson?" THE COURT: "Answer the question and then explain Mr. Cain." A. "Mr. Greco told me I could employ him." THE COURT: "Now he may explain." A. "Mr. Greco told me I could get me a helper and he could talk it over with Mr. Santee—" MR. COULTER: "Now don't go into that." MR. CHOWNING: "He can state what Mr. Santee told him." MR. COULTER: "Alright." A. "Mr. Greco told me he would settle that with Mr. Santee." Q. "And it was under that instruction that you employed Jake?" A. "Yes, sir." Q. "Now, about how long did you say that was before you left there?" A. "It was just about a month." Q. "And Jake went on under that employment during that entire time?" A. "Yes, sir." Q. "And you never did hear any conversation between Mr. Santee and Mr. Greco about that employment?" A. "No, sir." Q. "You do know that in that time the money came from the office of Montgomery Ward and Company?" A. "I got it and paid myself." Q. "You left Jake Jackson there when you left the job?" A. "Yes, sir." Q. "Who first suggested to you that you go to work on the truck at Montgomery Ward and Company?" A. "Mr. Greco." Q. "And it was under that

discussion that you went to work down there?" A. "Yes, sir." Q. "Where did you get your money?" A. "I got it at the store, from the office girl." Q. "At Montgomery Ward and Company?" A. "Yes, sir." Q. "Without a single exception?" A. "Yes, sir." Q. "Every week?" A. "Yes, sir." Q. "Now you say you took your orders from the shipping clerk, Mr. Smothers?" A. "Yes, sir." Q. "Your only duty was, I believe, to deliver merchandise from the store there to their customers out over the country?" A. "Yes, sir."

JAKE JACKSON, a witness called on behalf of defendant, being first duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. CHOWNING:

Q. "Jake, you worked with Mr. Luther Duncan on Mr. Santee's truck that was making the Montgomery-Ward deliveries the 27th day of June, 1938, did you not?" A. "I was working with him, yes, sir." Q. "As helper on the truck?" A. "Yes, sir."

Q. "It has been stated in, by some of the witnesses here, that, on that date, you and Mr. Duncan loaded an ice box on that truck down here in Little Rock at Montgomery-Ward and Company's store, and that you took the ice box and started to the store of Mr. Cantrell, the merchant at Greenbriar, Arkansas, and that, when you arrived there with the truck, the truck was backed up to a small, uncovered porch, or unloading platform, which was set out at the back of the store, and witnesses have testified that that porch or platform was approximately 30 inches in height, I believe some 27 inches at its lowest point and some 30 inches at its highest point, and that the truck was backed up to the porch and the end gate let down, so that the end gate overlapped the porch, and that you and Mr. Duncan then unstrapped the ice box inside of the van of the truck and proceeded to carry the box out of the truck. Now Jake, I want you to tell the

jury in your own way exactly how that ice box was handled after you brought the truck up to its position there by the porch when you and Mr. Duncan unstrapped it and started to take it out." A. "Well, sir, we backed the truck up to the porch, as near as he could get it, and then I let the end gate down and we unstrapped it from the side of the car where it was fastened, and he said, 'We will slide the cover off';—we always have a cover we put over them;—and I said, 'No, it won't hurt your hands if we leave it on'; and we picked it up and we both stooped down, and he says, 'Are you ready to go?', and we picked it up; and he says, 'Let it down'; and I seen we had to put it down; if I didn't it was going to fall on him; and then he said, 'You know, that hurt my back'; and he was crooked then, he didn't straighten up, and was goin' on, and he leaned back up against the truck and said, 'I can't do that'; and I says, 'How're we goin' to get it out?'; and then somebody come from over here towards the blacksmith shop and some young man come out of the store and we tried to pick it up; and he said, 'Oh Lord, I just can't stand it'; and then we put the thing out on the porch and slid it inside of the door, and then back this way."

Q. "Now, Jake, just where were you and Mr. Duncan at the time he complained and said, 'Let it down?' " A. "We had gotten—I don't know, but I say we hadn't made over three or four steps from the front end going toward the back end where the end gate was." Q. "How far would you say you were from the back of the truck where the end gate was?" A. "I would say about two feet; I couldn't say; you see, the end gate comes up this way and I reckon there was a piece comes down—" (stops). Q. "You were two feet from the end of the end gate, you were at least two feet inside of the truck?" A. "Yes, sir." Q. "Before you reached the end of the truck body?" A. "Yes, sir," Q. "He had not then at the time that he complained that he had hurt his

back stepped down or had not started to step down from the truck?" A. "No, sir."

MR. COULTER:

"Now, if your Honor please, I don't think he ought to lead his witness like that." THE COURT: "Don't lead him, Mr. Chowning."

MR. CHOWNING: Q. "The ice box then, Jake had not reached the end gate?" MR. COULTER: "Now, I object to that, your Honor please." THE COURT: "He said where he had gotten to; he said that it was within two feet of the end of the truck."

MR. CHOWNING: Q. "Alright, now did you set the box down right then?" A. "Yes, sir, I had to." Q. "Then what did you do?" A. "I slid it to the end of the end gate, had it balanced on the end of it that way, and I slid it down on this part of the porch, that is the bottom of the end gate, and then some men come in there." Q. "Did I understand you to say first you slid it out on the end gate?" A. "Yes, sir." Q. "And then somebody helped you move it from the end gate inside?" A. "Yes, sir." Q. "And Mr. Duncan did not participate in that at all?" A. "No, sir; he started to and he stopped."

A. "Jake, did you at any time while Mr. Duncan was on one side of the box and you on the other lift your side of the box above the level that you were then carrying the box?" A. "I don't know—No, sir, I don't think I did." Q. "Did you tilt the box over to him?" A. "No, sir; you see if I hadn't let down the box would have fell on him, because he let down himself, he might have tilted it then for neither one of us could straighten out in the truck." Q. "You were both bent over in the truck?" A. "Yes, sir." Q. "And you were both under the truck cover at the time he complained?" A. "Yes, sir." Q. "In a stooping position?" A. "Yes, sir." Q. "Had you straightened up or attempted to straighten up, Jake, at the time he complained?" A. "When he asked me to, we both said

we were ready to go, he was ready and I was too, and we picked it up." Q. "Had you ever straightened upright?" A. "No, sir, we couldn't do that."

Q. "Jake, after Mr. Duncan got back to town, what did he do?" A. "Well, before we got back to town I asked him how was his back getting along and he said, 'It aint doin' so good, it is hurting', and I says, 'Do you want me to drive the truck?' and he says, 'No, I believe I will get more relief if I drive it', and he drove back down to the store, and went upstairs somewhere and come down and I asked him again how his back was doin' and he said, 'It ain't doin' so good.' And we got some more things and we got another boy and the next day I asked him how he was getting along and he said he wasn't doing so good, and the next thing I knew there was another driver up there."

Q. "Jake, did you continue to work on the truck after Mr. Duncan quit?" A. "Yes, sir." Q. "How much longer did you work?" A. "Oh, I worked after Mr. Duncan quit, I believe I worked a long time; he had two or three more drivers then."

Q. "You are not interested in any way in the outcome of this lawsuit, are you?" A. "No, sir."

Q. "Jake, who did you take your orders from when you were on that truck?" A. "The driver." Q. "Whoever the driver happened to be at that time, you took your orders from him?" A. "Yes, sir."

CROSS EXAMINATION BY MR. E. H. COULTER:

Q. "Jake, did you know Mr. Santee at the time that you went to work on this truck?" A. "No, sir." Q. "Never had seen him, had you?" A. "If I did I don't remember it." Q. "How long had you been at work down at Montgomery-Ward Company before you ever heard anything about Mr. Santee at all?" A. "Oh, I had heard about Mr. Santee before then, because a boy working for Mr. Santee told me somebody wanted a man on a truck, and I would have to see Mr.

Cain, go down to the store and meet him about nine o'clock Monday morning." Q. "Mr. Cain, that worked at Montgomery Ward and Company at that time?" A. "Yes, sir."

Q. "You always got your money over at the store?" A. "Yes, sir." Q. "Mr. Santee never did give you a dollar?" A. "Yes, he did." Q. "For work you did at the store?" A. "I asked for a raise, and he gave me fifty cents one day and another time a dollar." Q. "And those are the only raises you ever got?" A. "Yes, sir." Q. "You say you could not straighten up?" A. "No, sir, with the ice box on the bottom where you had to catch it, the top would hit the top of the trucks." Q. "How did you have hold of it?" A. "You-under, by the side—under the bottom." Q. "Under the bottom, and where the pans come out?" A. "No, sir, it was a pan come out, and that left us six inches for your hand." Q. "And you picked it up and Mr. Duncan started backing out and you were following like that?" A. "Yes, sir."

Q. "Had you ever handled any of these boxes before like that?" A. "Yes, sir." Q. "With Mr. Duncan?" A. "Yes, sir." Q. "That was the way it was always done?" A. "Yes, sir." Q. "And you say he always gave you the directions?" A. "Yes, sir." Q. "And he did on this occasion?" A. "Yes, sir."

Q. "Jake, just about where were you when Mr. Duncan said, 'Jake be careful, I am stepping down'?" A. "He didn't say that; he said, 'Put it down.' " Q. "And he never said anything to you about stepping down at all?" A. "No, sir."

Q. "How high was the box off the floor when he told you to put it down?" A. "Well, it was just about as high as here I am sitting, I reckon it was." Q. "You knew it was about to fall on Mr. Duncan?" A. "It was going to fall on him if I hadn't set it down."

Q. "Jake, could you have carried this box out with both of you walking sideways?" A. "Yes, sir,

it would have hit the wall, only there is a box in between there on the walls where the wheels were, and we were going through that place, and he said, 'Set it down, set it down', and I set it down."

Q. "Where did you have that ice box located on that truck?" A. "Right up in the front end."

Q. "Alright, he was telling you all the time he hurt himself?" A. "Yes, sir, he told me, there was nobody there but me and him." Q. "And he gave you notice he was hurt?" A. "Yes, sir."

Q. "Do you recognize that picture that has been introduced here, as plaintiff's exhibit number one?" A. "That's the bed of that truck." Q. "That boy standing up there, that is just about how high that bed was, that shows?" A. "Yes, sir." Q. "That comes up just about to the boy's shoulder here?" A. "Yes, sir."

RE DIRECT EXAMINATION BY MR. CHOWNING:

Q. "Jake, you recognize that boy that is in that picture?" A. "No, sir." Q. "Look at him and see if you know him." A. "That's Saul, isn't it?" Q. "What is his last name?" A. "Saul." Q. "Whom does he work for?" A. "Mr. Santee." Q. "He is a taller man than you, isn't he?" A. "Yes, sir."

C. V. GRECO, a witness on behalf of defendant, being first duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. CHOWNING:

I am manager of the Montgomery Ward & Company store in Little Rock, and have been working in that capacity since May, 1937. The contract with Mr. Santee was made a couple of weeks after I got here. Mr. Santee's testimony is correct to the effect that we operated under the contract in writing for a period of time and then agreed to take off one of the trucks and reduce the compensation to $50.00 a week, and that was done. Mr. Santee employed J. D. Parker

as a driver of the truck, and later, a man named Keatts. I received numerous complaints against Keatts, and, in turn, I complained to Santee.

Q. "What did he say?" A. "He told me at the time that he didn't have anybody available." Q. "Well, did; was Cain the man that took Keatts' place?" A. "Yes, sir, he was, we discussed quite—" Q. "How did Cain happen to be employed and put on the truck?" A. "When Mr. Santee told me he didn't have any man available and strong enough to handle that job I turned to my file and pulled out my file and in this file I found Mr. Cain's application, and I asked Mr. Santee if he knew Cain, and he said 'Yes, isn't he the boy that worked for you at one time?', and I said, 'Yes', and I says, 'Do you think he can handle the job?', and he says, 'I think he can', and I says, 'Suppose we put Cain to work?', and so I got in touch with Mr. Cain and told him to see Mr. Santee; that I had already talked to Mr. Santee about it." THE COURT: "What he told Cain would not be proper unless made in the presence of Mr. Santee." MR. CHOWNING: Q. "Alright then, omitting that." A. "I told Mr. Cain to see Mr. Santee; that is as far as I know." Q. "And as a result of that conversation Cain was put to work on the truck?" A. "Put to work on the truck." Q. "Now Mr. Cain worked for some period of time and then quit?" A. "Yes, I believe so." Q. "And Luther Duncan succeeded him on the truck?" A. "Yes, sir." Q. "And will you explain how Luther Duncan happened to be the driver on that truck, Mr. Greco?" A. "Mr. Cain was going to leave town, and he either told my stockroom man that he was quitting, or told Mr. Santee, for Mr. Santee came to see me and discussed the question of Cain quitting, and again the question came up of who was going to drive the truck, and again Mr. Santee didn't have anybody available, that is, he had nobody available but his regular moving man." Q. "Alright, go ahead." A. "I talked with Mr. Duncan about employment some two or three days

previous to that, and had his application in my file, and I pulled this application out and presented it to Santee and told him who the man was, and that I had interviewed him and that he was a pretty good man, that he should be able to handle that job, and Mr. Santee said, 'How much money will I have to pay him?', and I said, 'Well, he is making an average of thirteen or fourteen dollars a week.' " Q. "Go ahead, Mr. Greco, as a result of that conversation then he asked you how much the man would want to work for?" A. "Oh, yes, sir, when that question came up I told Mr. Santee I thought we should pay the man at least $15.00, that he had a wife to support and that was agreed on, and Santee asked me to get in touch with this man and put him to work, and be sure that he drove one or two days with Mr. Cain before he took over the truck."

At the time I was talking to Mr. Duncan when I took his application, I was figuring on putting an extra man in the stockroom; and when the question of having Cain replaced on the truck came up, I discussed Duncan with Mr. Santee. I talked to Santee twice before he told me to have Duncan go to work. As a result of my talking to Santee, Duncan went to work on the truck.

Q. "Now, Mr. Greco, did you have anything to do with employing Jake Jackson?" A. "I did not." Q. "Did Jake Jackson—" A. (Interrupting) "Pardon me just a minute, with the employment of Jake Jackson?" Q. "If you had anything to do with it just tell what you did have to do with it if anything?" A. "I had nothing to do with Jake Jackson going on the truck." Q. "At the time that Jake Jackson went on the truck wasn't there an adjustment made on the contract between you and Mr. Santee?" A. "I knew that somebody was going on the truck, but who, I didn't know. Mr. Santee had come to me previously and said that he thought that I should stand some of the expense of the extra man on the truck, and I said,

'How much is the man going to cost?', and he says 'He is going to cost $4.00 a week for a colored boy,' and I says, 'Alright, let's split it; I will raise your contract $2.00 and you pay the man.'" Q. "And you raised the contract from Fifty to Fifty-two dollars?" A. "$52.00 a week." Q. "And he paid the man?" A. "And he paid the man; that's what we did."

Q. "Mr. Greco, did you have any talk with Mr. Santee about this contract and the hiring of drivers; did you ever use the words, 'From now on I am going to hire the drivers', or words to that effect?" A. "I did not."

I had no interest in the way the deliveries were made so long as they were satisfactory to the customer. I never dictated to the drivers about their personal habits, or anything they did on the trucks or while they were operating the trucks, or how many hours a day they should work, or when they should work.

I have checked the records on the capacity of the ice box which was sold to Mr. Cantell and delivered to him on June 27, 1938. It is a six foot standard refrigerator. I went out within the last two or three days and picked up an identical box at a customer's home and had it weighed. It weighed exactly 272 pounds.

I never did tell Mr. Smothers to order these men of Santee's to help there in the store room when they were not making deliveries. They did not work in the store at the direction of anybody in the store—not to my knowledge. Naturally I did not see them all the time, but to my knowledge they did not.

CROSS EXAMINATION BY PLAINTIFF WAIVED.

L. G. SMOTHERS, a witness on behalf of defendant, being first duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. CHOWNING:

I have been in the employ of Montgomery Ward & Company as receiving clerk and shipping clerk for fifteen months. Mr. Santee was making deliveries for Montgomery Ward & Company at the time I went to work. J. D. Parker was the truck driver at that time. Then came Keatts, then Cain, and Duncan succeeded Cain.

Q. "Now, Mr. Smothers, did you ever at any time tell J. D. Parker or any other driver on Mr. Santee's truck that when he wasn't actually engaged in making deliveries that you expected him to help you around in the stockroom down in the basement or anywhere else?" A. "Nothing except pertaining to deliveries, probably that—probably deliveries that would be made on—you see, lots of times it would take considerable time to get the deliveries together, and he would be upstairs to see about everyone and I would be downstairs and give him tickets and locate this merchandise and get it to where the customers are."

CROSS EXAMINATION BY PLAINTIFF WAIVED.

DR. R. A. LAW, a witness on behalf of defendant, being first duly sworn, and his qualifications having been admitted by plaintiff testified as follows:

DIRECT EXAMINATION BY MR. CHOWNING:

I am a physician, and, for the past twelve years, I have confined my practice exclusively to X-rays. At the request of counsel for the defendant in this case, I took some X-ray pictures of plaintiff, Luther Duncan, on February 10 of this year. I have those pictures and now show them to the jury, and will explain what I have found from them. The first set were taken in pairs at different angles so they can be arranged in a shadow box with mirrors so as to reflect one image with the appearance of showing the third dimension,

so as to enable us to locate internal objects—bones or foreign bodies. The next picture is one of Mr. Duncan's back. The apparent scars or scratches are the deposits of iodized or opaque oil, injected so the X-ray would show its shadow. The black spots are gas in the intestinal tract.

The next film is the mate to the last one above mentioned. These first two were taken while Mr. Duncan was lying on his back. The next one was taken while he was lying on his side. You can look right through him (illustrating). In this the bodies of the vertebrae stand out clearly. You can also see the white spots representing the iodized oil which was injected into the spinal canal. You will observe in this region (illustrating) the loss of two of these spinous processes, which are the bony parts that you can feel in your back.

"So the interpretation of the film in this is a spine in which has been injected an iodized oil and then operated on and there has been a removal of these spinous processes and the laminae or thin bone plates which start out here and completely encircle the canal; two of these have been removed. On the side of my film I find no evidence of fracture or dislocation. There is a defect in this patient's back down here which is of no particular consequence as it is a defect which has existed since birth because you will notice each one of these vertebrae have a pair of little bony plates sticking out on the side, and that is for the attachment of these long heavy muscles running up and down the back. The one on the last vertebra is distinct and separate and the one on the left side grew into a large bony plate and fused with this bone, the sacrum, and this is the hip bone. In other words, the two sort of fused on that side, an extra brace. That is the description the best I can give it of the structure and stages we expect to see on an X-ray examination of a back."

In the film or picture that shows the pelvic region,

I discovered a foreign body that I interpreted as being a piece of hypodermic needle, located behind the pelvic bone, in front of the spine right in the region of the sciatic plexus or sciatic nerve.

The pictures which I took did not show a condition which I would interpret as showing a rupture of the cartilagenous pads between the vertebrae. When these elastic, cartilagenous pads or shock absorbers between the vertebrae become ruptured, they react in the same manner as a flat tire, and lose their elasticity. I do not find that condition in this patient. All of these spaces have the normal width. You can see from these pictures that I have exhibited that the vertebrae are not in contact, but that there is a good spacing between the vertebrae from which Dr. Ogden removed certain parts.

I now examine the picture from which Dr. Ogden made his diagnosis that the patient had a ruptured cartilagenous pad. I do not agree with that diagnosis for the reason that, if the pad had been ruptured, it would have closed the canal, and the opaque oil would not have passed the obstruction, and the oil would show only above or below the obstruction, while here it shows both above and below.

When one of these pads is ruptured, you do not have any loss of the material: it is still in there: it has to go some place. It most probably comes out anterially, because that is where there is the least resistance.

CROSS-EXAMINATION BY PLAINTIFF WAIVED.

DR. JOE SHUFFIELD, a witness on behalf of defendant, being first duly sworn, and his qualifications having been admitted by plaintiff, testified as follows:

DIRECT EXAMINATION BY MR. CHOWNING:

I have been practicing as an orthopedic and bone

and joint surgeon for sixteen years. My work has been limited to that for the last six years.

At the request of counsel for the defendant in this case, I have recently examined Luther Duncan. He came to my office on February 10. Of course, we got his history.

"He stated that he was injured in June and prior to that injury he was injured in March; his injury in March was thought to be of a minor nature, and he didn't lose much time from his work, three or four days, and he worked from then on to the present injury and his health has always been good, his present trouble, of which he complains at this time, appearing to be in some part of the back; both hips or back of both thighs, also the side of both legs, to the heel and foot and the condition is much worse in the right lower extremeties than in the left and went ahead and told us about where this occurred and how it occurred, at Greenbriar, Arkansas. But I do not believe there is any necessity for me to read it all here. One significant thing is that he drove the truck home that day and made some deliveries that day and also the following day when he had to quit work. He told us that he did not make the deliveries himself from the truck where he was hurt except when there was a cash delivery or C. O. D. and he said he went to the Trinity Hospital on the 28th day of June and had an examination and had some X-rays made and on July 3rd that he went into the hospital and was operated on on July 6th, and at that time he understood it was the fourth lumbar vertebra, part of it was removed, and he stayed in the hospital ten days and then went home; said there was no cast applied to him and that he improved some, later his pain grew worse and he had to return to the hospital or went to the hospital for treatment all along and he returned as a patient in the hospital in September; he said he did not know the exact date but he stayed in the hospital that time about sixteen days and his back was operated on again and he was

under the impression it was the third lumbar vertebra which was operated on at that time and he returned to the hospital for treatments along and finally he went back in the hospital, he didn't know the exact date, but it was sometime in December and at that time, I believe, he had an operation on his hip and had some more injections made and since that time he has been about like he is now, having considerable pain mainly in the right hip and right lower extremeties; the left at the present time is considerably better."

On our examination, we did not find anything wrong with him except these things complained of. We found the third and fourth spinous processes to be absent. The X-rays show they were removed. We found the shape of the back to be normal. There seems to be no tenderness over the sacro-iliac joint but there is tenderness along the course of the sciatic nerve from where it leaves the pelvis all the way down to the foot. We found no evidence of any break or dislocation, the reflexes are normal, and there is no atrophy of his muscles, any more than there would be if a person had not done any work in the last few months, and the X-ray of the spine shows no break or dislocation. The cartilagenous pads between the vertebrae do not seem to be diminished, but are of normal thickness for a man of his size.

Q. "Was there anything in the X-ray which you examined which Dr. Law took to indicate that there has been any rupture of any one of these pads?" A. "No, sir, not a rupture which means a part of the material in that space has leaked out, and when anything loses, as between the two, the two will go together, grow together, gravity and muscle power together will naturally force the bones closer together than they would have been and these bones are the normal distance apart." Q. "If the pulp is lost within the pad, is once squeezed out, nature does not replace it?" A. "No, sir." Q. "There will be a permanent

diminishment?" A. "This place will remain narrow after that."

I now have before me the X-ray picture from which I heard Dr. Ogden testify that he had diagnosed this shadow here as evidencing a rupture of this pad and the protrusion into the spinal canal.

Q. "Now state whether in your opinion that is correct?" A. "I don't think that has happened in this case; I doubt if you drew a straight line and laid this pencil in the gap that the deformity would be in the end of the pencil, it is below the pencil, here is where the absence of the fluid or of the pad would come directly back out of that, and would be there where the end of the pencil is; if you can see, the pencil is in the crack between the two bones, and there is that fluid present and the gap is below that line."

Q. "Doctor, if there was pressure by reason of the rupture of this pad against these cords here, would that have a tendency to bring the oil, to prevent the oil flowing down past that area?" A. "Oh, yes, if the pad slipped sufficiently to get this much deformity, if you rate that only from about that, the distance from this point to here, the deformity, I would estimate three quarters of an inch or more, and if that be present it would be impossible for this fluid to be here unless injected here and down here too, because it could not get by, because the body could not be three quarters of an inch and then contain the spinal column." Q. "Is it customary to make more than one injection?" A. "No, sir, only one."

As a result of the operation, the patient has no bone behind the skin of his back and around those nerves that run down to the end of the spinal cord. Nature will not rebuild that bone.

Q. "There was one thing else I failed to ask you; will you step down again a moment; will you kindly tell the jury just about the location of that fragment of hypodermic needle?" A. "Now then the nerve that

makes up the sciatic nerve comes out through these openings between the vertebrae, you see, and they come and go in this region here, right about where my pencil is, down in the hip joint and in by the side posterially, and evidently he injected at that nerve is how come that needle there is why it broke off, it is right in the region where he was striking for the nerve." Q. "Does it appear to be in close proximity to the pelvic bone?" A. "Yes, inside of the pelvis lying in here and about the—and when you view it from the X-ray this bone overlaps it and it is lying right back a couple of inches, might be three inches. Anywhere, in other words, this little spine right here, right behind this bone, and it is right in front of this little process, and this sciatic nerve crosses right through here." Q. "Now, doctor, would the presence of a fragment of a hypodermic needle that was broken off as this needle is that is not actually in contact with the sciatic nerve or in close proximity thereto, would that cause Mr. Duncan any discomfort?" A. "Yes, it would, of course, I don't know whether that is in the nerve, but we know this; that is what he was striking at with his needle, to inject it, so it is either in it or right near it and the x-ray shows it is in the nerve and if it is in the nerve it is bound to be causing a lot of pain in that nerve and of course if it is near it the muscles will catch that nerve." Q. "Whether it is actually in the nerve or in close proximity thereto, he would be suffering from the presence of that needle?" A. "Yes, he could be easy enough."

The patient's present suffering on the right side of his hip and down his right leg is due to the irritation of the sciatic nerve on the right side. That needle, if it is in the sciatic nerve, could cause the irritation. If the needle is in the nerve, its removal would result in his improvement.

I don't know of but two or three things that are more painful than sciatic neuritis. We think it may be caused by many things. It is not always caused by

an injury. If a foreign body is the cause of the trouble, the patient ought to get well slowly; the cases we have seen are very stubborn but still ought to improve.

It is difficult or impossible to locate the source of pain along the course of a nerve. The brain is unable to interpret the pain along the course of the nerve. The pain which the plaintiff says he feels in the small of his back could be due to the needle.

Patients sometimes attribute the origin of sciatic neuritis to lifting, or strains, or jars, which, in fact, have no connection with the trouble.

The loss of the spinous processes, or portions of the vertebrae, as in this case, is not nearly so serious as the layman might think, because of the heavy ligaments and muscles that protect that region. Of course, it does weaken it some. His back will probably be somewhat incapacitated with lifting, or attempting to do so, but not as much as the layman would think, because he has that big, strong ligament that will take care of it very well.

CROSS EXAMINATION BY PLAINTIFF WAIVED.

DR. VAL PARMLEY, a witness on behalf of defendant, being first duly sworn, and his qualifications having been admitted by plaintiff, testified as follows:

DIRECT EXAMINATION BY MR. CHOWNING:

I have been practicing medicine since 1916, and have specialized in surgery since 1929. I heard practically all of the testimony of Dr. Ogden and all of the testimony of Dr. Shuffield and Dr. Law. At the request of counsel for the defendant in this case, I participated in the examination which Dr. Shuffield made of Luther Duncan a few days ago. I concur in the opinions, conclusions and findings of both Dr. Law and Dr. Shuffield, and in the interpretation which they put on the X-rays, as expressed by them in their testi-

mony. We studied these films together, and reached the same conclusions.

Q. "Now that is the one that Doctor Ogden said he made his diagnosis of ruptured cartilagenous pad lying right between these two vertebrae, lumbar vertebrae, did you agree in every respect in your views with reference to whether or not there had been any rupture back there as shown by that picture, or in other words, seeing that picture now as it is, and that was taken before the operation, would you have diagnosed that as a ruptured pad?" A. "No, sir, I think not, that is the back position, Mr. Chowning, but to say I am disagreeing is no criticism of the way the doctor makes the diagnosis or the diagnosis he makes, it is a matter of disagreement only. I don't think that shows a rupture, permits the loss of the filling of this pad, which is the liquid matter or the semi-liquid matter in the disc, the intravertebral disc, which is the pad which lies between these two vertebrae. I don't think it shows in this film, if it did there would not be any of that oil in below; because if there was an obstruction in it it would obstruct this spinal canal completely and none would be below, and furthermore, that is in a very unusual place, they are circular, the same shape that these vertebrae are, circular, because they sit between them, and it has a very thick cover." Q. "You mean then, taking we will say, a sliver out, as an example off that pad, the rupture would be right up through the center of it rather than out from the edge?" A. "Yes, sir."

CROSS-EXAMINATION BY PLAINTIFF WAIVED.

(Here the court recessed for noon, after which it reconvened and the following proceedings were had):

MR. CHOWNING: "Now may it please the Court, I want to stipulate as to the dimensions of the

end gate and the dimensions of the ice box." THE COURT: "Alright."

MR. CHOWNING: "It is stipulated by counsel for both the plaintiff and the defendant that the end gate is approximately five feet six inches long, measuring over the longest dimension, that would be measuring from one side of the body of the truck to the opposite side of the body of the truck, and that it is approximately two feet six inches in depth; that will be taken from that point closest to the end of the truck bed across, straight across to the opposite side. That it is approximately five feet six inches in length by approximately two feet six inches in width. It is also stipulated that when the end gate is let down there is a space between the end gate and the end of the truck bed that is approximately three inches in width, and that it is the custom for the driver of the truck to carry a small piece of two by four which had been specially prepared to slip down in that three inch crack or space between the edge of the end gate and the end of the truck bed so as to make approximately an unbroken extension of the floor from the edge of the truck on out to the outer edge of the end gate.

"It is also stipulated that this ice box that was delivered to Mr. Cantrell's store was approximately 57 inches in height and approximately 29 inches in width and approximately 22½ inches in depth straight through the middle of it."

Here the defendant announced that it rested its defense in chief, whereupon the plaintiff, further to sustain the issues in his behalf, offered the following testimony in rebuttal:

E. L. SANTEE, a witness on behalf of plaintiff, being recalled, further testified as follows:

DIRECT EXAMINATION BY MR. E. H. COULTER:

Mr. Greco called me to advise with me about em-

loying Cain. I did not consent to his doing so. I vanted to keep my own drivers, and he held out for ain, and we had a truck tied up one day, and he didn't et any service, and I finally gave in.

I did not tell Greco to go ahead and put Duncan o work before Duncan was employed. I didn't know nything about it.

CROSS EXAMINATION BY DEFENDANT WAIVED.

LUTHER M. DUNCAN, the plaintiff, being re-alled, further testified as follows:

DIRECT EXAMINATION BY MR. E. H. COULTER:

There was no one on the porch at Mr. Cantrell's tore at Greenbriar when we were unloading the ice ox there.

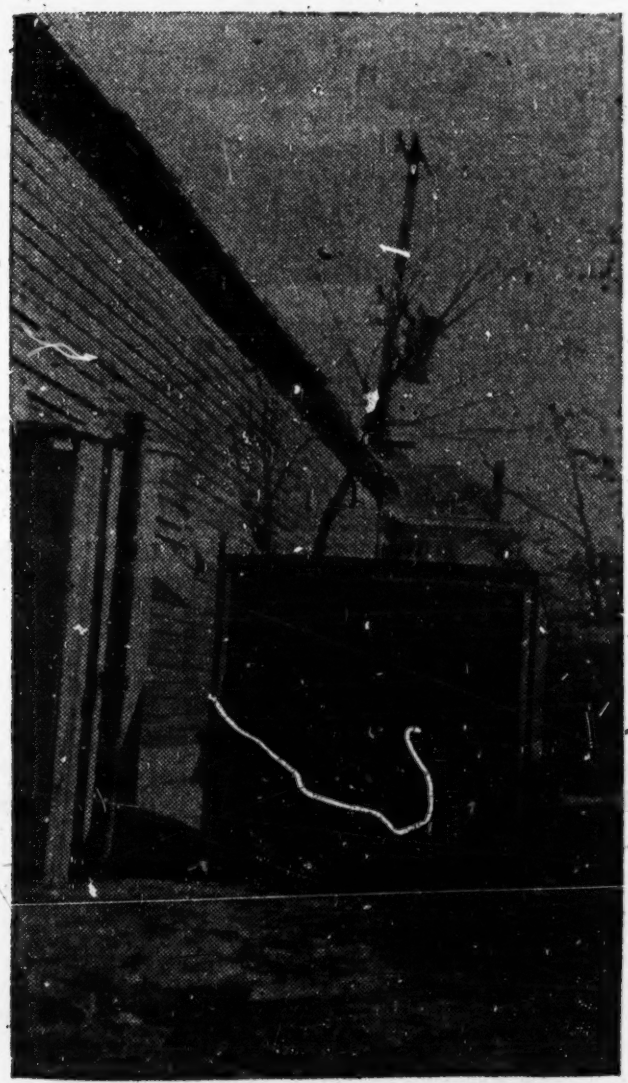
Mr. Landers went out to Greenbriar that day ith me and Jake Jackson on the truck. We picked im up in Conway as we went through there. Mr. anders was in the store talking to Mr. Cantrell while e were unloading the ice box. Mr. Hughes was not ere at that time. We met him on our way back, and r. Landers got out and got in the car with him. That as the last I saw of him.

Q. "Mr. Duncan, there has been some testimony ere about Dr. Ogden and yourself and some others bout an operation for a hypodermic needle that was roken off in your hip; I believe the testimony is that at was broken off there sometime in November or ecember?" A. "December." Q. "Have you experi-ced any difficulty from that needle since it was oken off and left there?" A. "No, sir." Q. "Has ere been any particular change in your condition in at region?" A. "No, sir."

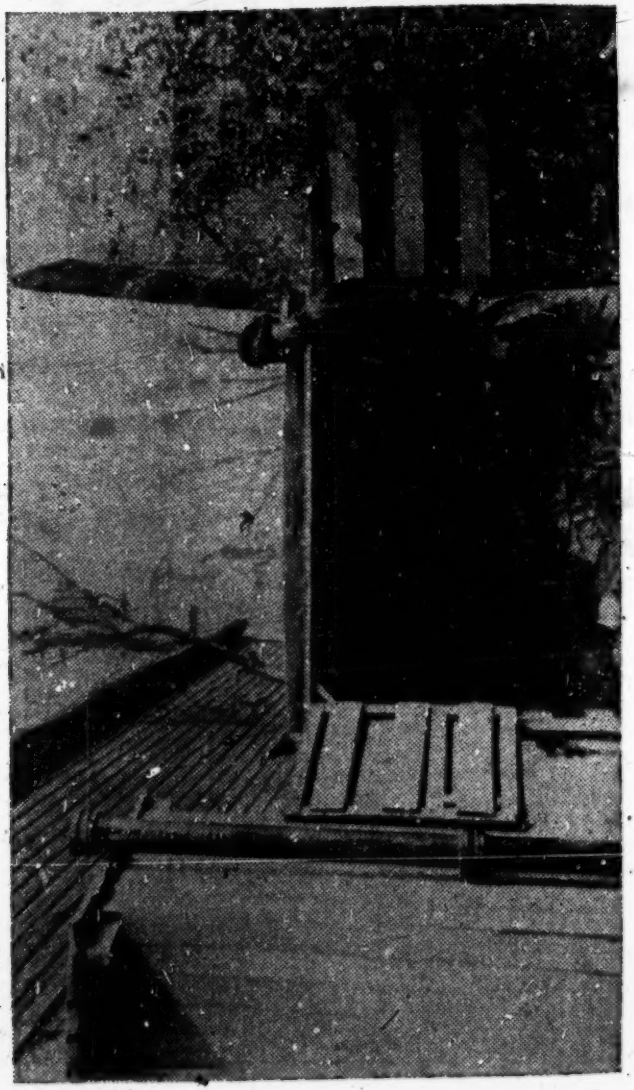
CROSS EXAMINATION BY MR. CHOWNING:

Q. "Mr. Duncan, how do you know that you have

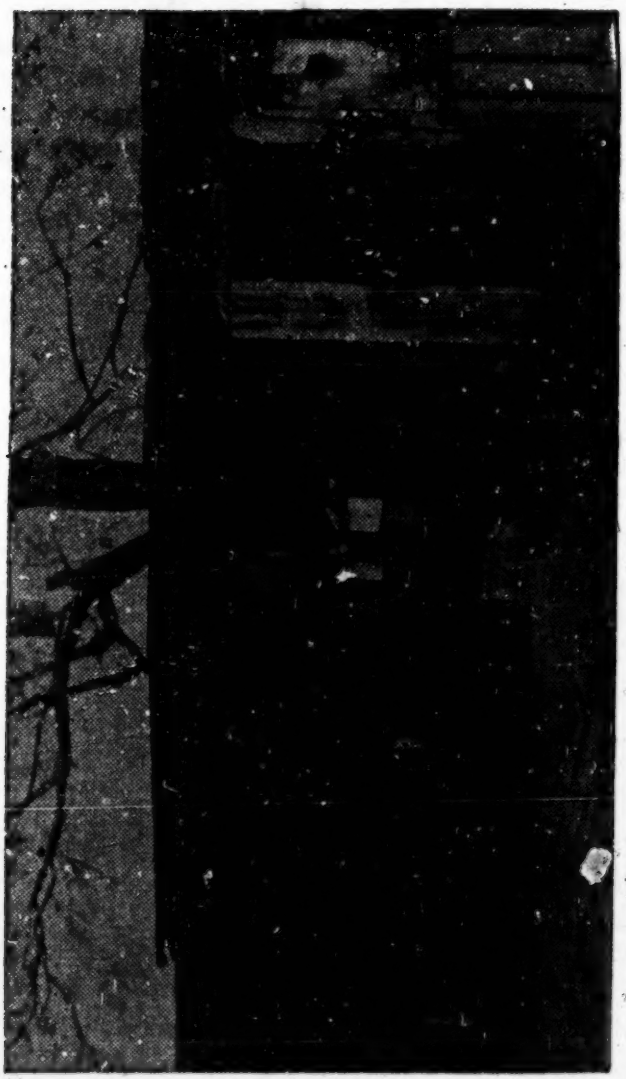
experienced no difficulty from that needle?" A. "Well, the reason that I know that, I had that trouble before; the fact of the business is I couldn't bear my weight on that leg at the time before that." Q. "And since that needle was broken off, what treatment have they given you; that was broken off you say in December?" A. "Yes, sir." Q. "Now you said a moment ago, I mean yesterday, as I remember, that you didn't know when they operated on you for the needle, didn't you?" A. "Well, I didn't know that that was what they went in there for, the needle I said." Q. "Well, didn't you understand Dr. Ogden to say that he tried to get that needle on November 18th?" A. "Yes, sir." Q. "Well, now, if the needle was broken off in December—" A. "It was in December that he tried to get it." Q. "You say it was in December?" A. "Yes, sir." Q. "And he tried to get it in December and not in November?" A. "Yes, sir." Q. "In saying that the needle has not caused you any trouble, that statement is based upon your opinion, because you say that prior to the needle being broken off you were suffering the same symptoms that you now suffer?" A. "Yes, sir." Q. "Now, are you worse, now, or better than you were at the time the needle was broken off?" A. "I am better." Q. "You have improved since then, since that time?" A. "Yes, sir."



Plaintiff's Exhibit No. "1".



Plaintiff's Exhibit No. "2"



Plaintiff's Exhibit No. "3".

Here both the plaintiff and the defendant announced that they finally rested, whereupon the following proceedings were had:

MR. CHOWNING: "Let the record show again that I offer to ask for a directed verdict in the presence of the jury and to state my reasons for asking for the directed verdict specifically and that the Court overruled my motion that the motion be made in the presence of the jury and ruled that it must be made in chambers, and that I have saved my exceptions to that ruling.

Whereupon the Court was then recessed, and the Court and counsel and the Reporter retired to chambers, when the following proceedings were had:

MR. CHOWNING: "The defendant requests the Court to direct a verdict for the defendant for the following reasons:

"First: The evidence introduced by plaintiff is insufficient to make a prima facie case and fails to establish the relation of employer and employee as between the defendant and Jake Jackson.

"Second: The evidence considered in its most favorable light on behalf of the plaintiff is insufficient to support any verdict that might be rendered the plaintiff against the defendant.

"Third: The evidence shows as a matter of law that the injury sustained by plaintiff, if any, on June 27, 1938, was the result of one of the ordinary risks and hazards of his employment which was open and obvious and known to and appreciated by him, and assumed by him as a part of his employment.

"Fourth: The evidence shows that the plaintiff was a fellow servant of Jake Jackson; that both were the employees of E. L. Santee and further shows that E. L. Santee was an independent contractor insofar as the defendant and his relations to the defendant was concerned.

"Fifth: That the plaintiff has failed to prove by a preponderance of the evidence that he was injured in the manner alleged in his complaint, and that if injured, that he was injured by any negligent act or acts on the part of Jake Jackson.

"Sixth: That the evidence shows that the plaintiff was himself guilty of negligence in the manner in which he attempted to unload the ice-box from the truck to the loading platform, and that if there was any negligence on the part of the helper, Jake Jackson, that the plaintiff was guilty of such contributory negligence in the case, as in the event of recovery would diminish his recovery in proportion to what his contributory negligence contributed to his injury."

THE COURT: "I will overrule your motion."

MR. CHOWNING: "And the defendant saves exceptions to the Court overruling the motion."

Here the cause was argued to the jury by counsel for the respective parties, after which the court, at the request of the plaintiff, instructed the jury as follows:

"Ladies and Gentlemen of the Jury:

1. "If you find, from a preponderance of the evidence in this case, that Jake Jackson was employed by, or was an employe of, Montgomery Ward & Company, on or about June 27, 1938, and at the time of the alleged injury of plaintiff, and if you find that the said Jake Jackson was negligent in handling the ice box, as alleged in the complaint, and if you find that, as a result of the carelessness and negligence of the said Jake Jackson in handling said ice box, plaintiff was injured, then your verdict should be in favor of plaintiff, unless you find that he is precluded from recovery because of assumption of risk, as hereinafter defined; and, if you find that plaintiff is entitled to recover, then you will assess his

damages in such sum as will, in your judgment, fairly compensate him for his injuries, under all the circumstances; and, in arriving at what would be a fair compensation to plaintiff, if you find that he is entitled to recover, you may take into consideration his own negligence contributing to his injury, if any, his loss of earnings, if any, his medical and hospital expenses, if any, his pain and suffering, if any, and such future loss of earnings, expenses for hospitalization and medical treatment, and pain and suffering, if any, as, in your opinion, a preponderance of the evidence shows him to have contributed or that he has sustained or will sustain.

2. "You are instructed that contributory negligence consists in the doing of something by a person in connection with his employment that an ordinarily prudent person would not do, or in the failure to do something that an ordinarily prudent person would do, under similar circumstances.

3. "You are instructed that, even though you should find that plaintiff was guilty of contributory negligence, as herein defined, and that, except for such contributory negligence, the injury to plaintiff would not have occurred, still you are instructed that such contributory negligence would not, within itself, and standing alone, bar recovery, but that it would only diminish that amount which you may find plaintiff is entitled to recover, if anything, in proportion to the amount of such negligence, if any.

4. "You are instructed that an employe of ordinary intelligence, experienced in the line of his duty, and not working under the immediate direction of his superior, assumes only the ordinary risks of danger incident to his employment, which are obvious and imminent, and which he necessarily must have known and appreciated, in

the exercise of ordinary care for his own safety in the performance of his duties, and not the extraordinary or unusual dangers or hazards of such employment, or those of which he was ignorant or which he did not appreciate."

And, at the request of the defendant, the Court further instructed the Jury as follows:

2. "The term 'proximate cause', as used in these instructions, means the cause which in natural and continuous sequence, unbroken by any efficient intervening cause, produced the result complained of and without which the result would not have occurred.

3. " 'Ordinary care', as that term is used by the Court in the giving of its instructions in this case, means such care as an ordinarily prudent person would use under the same conditions and circumstances, as they then appeared to exist.

5. " 'Contributory negligence' is the doing of something by the plaintiff which a person of ordinary prudence would not have done under the same circumstances, or the failure of the plaintiff to do something which a person of ordinary prudence would have done under the same circumstances, which conduct of the plaintiff contributed to his injury and without which his injury would not have occurred. And in this case, if you find that the plaintiff did something which a person of ordinary prudence would not have done under the same circumstances, and that such conduct on the part of the plaintiff contributed to his injury and that his injury would not have occurred without such conduct on his part, then the plaintiff would be guilty of contributory negligence; and, in the event you return a verdict for the plaintiff, you should diminish the amount of the plaintiff's recovery herein in proportion to

the amount of negligence attributable to the plaintiff.

6. "An 'independent contractor' is one who, exercising an independent employment, contracts to do a certain piece of work according to his own methods, and without being subject to the control of the other contracting party, except as to the result of the work. In analyzing a given state of facts to determine whether or not a given contract creates the relation of master and servant or that of independent contractor, the final question for decision is whether the physical conduct of the contractor in the performance of his duties is controlled, or is subject to the right of control, by the other contracting party in respect to the details of the work; where the subject of the contract is to produce a certain net result, according to plans and specifications, reasonably specific and definite in their end, already agreed upon and made a part of the agreement, and the contractor's obligation is to produce that net result by means and methods over which, in the performance, so far as concerns the details of the management of the means and the physical conduct of himself and his employees thereinabout, he has and is obliged to have, his own control, the contract is one for service, not of service, and the relation of master and servant does not exist.

7. "You are instructed that there may be a situation or case of personal injury where the injury or damage can only be said to be the result of a mere accident, for which no one is responsible in law; and if you believe from the evidence in this case that the injury suffered by plaintiff was the result of an accident, without being caused by any negligence of Jake Jackson, then your verdict must be for the defendant.

8. "If you find that the plaintiff sustained an injury at Greenbriar, Arkansas, at the time

and in the manner alleged by him, but that such injury was the result of one of the ordinary risks and hazards of plaintiff's employment, which hazard was open and obvious and appreciated by him, then your verdict will be for the defendant.

10. "If you believe that Luther Duncan is now disabled, as alleged by him in this suit, but you further believe from the evidence that the proximate cause of such disability, if any, is not the injury, if any, which he received at Greenbriar, Arkansas, on June 27, 1938, but, on the contrary, you believe that the proximate cause of such disability, if any, is unskillful and improper surgical and medical care and treatment given him by his physician or physicians since the occurrence of such injury, if any, or that the proximate cause of such disability, if any, is a broken hypodermic needle imbedded in the pelvic region of plaintiff's body, then you are instructed that the plaintiff would not be entitled to recover against the defendant for any injuries or disabilities, if any, resulting from such unskillful and improper surgical and medical care and treatment, if any, or any disability, if any, resulting from that part of the broken hypodermic needle now in the pelvic region of plaintiff's body.

11. "You are instructed that the burden of proof is upon the plaintiff herein to establish his case, including the act or acts of negligence complained of, by a preponderance of the evidence, that is to say, the burden is upon the plaintiff to show you by a preponderance of the evidence, not only that he was injured but that his injuries were proximately caused by some act or acts of negligence alleged in his complaint.

"The weight of the testimony does not necessarily depend on the greater number of witnesses sworn on either side of the question in dispute, but you are at liberty as jurors to consider all of

the facts and circumstances appearing from the evidence and determine from that which of the witnesses are worthy of the greater credit.

12. "You are instructed that you are the sole judges of the credibility of the witnesses and the weight that should be given their testimony. With that the court has nothing to do. You may judge of the credibility of a witness by the manner in which he gives his testimony, his demeanor upon the stand, the reasonableness or the unreasonableness of his testimony, his means of knowledge as to any fact about which he testifies, his interest in the case, the feeling he may have for or against the plaintiff or defendant, or any circumstance tending to shed light upon the truth or falsity of such testimony; and it is for you at last to say what weight you will give to the testimony of any and all witnesses. If you believe that any witness has wilfully sworn falsely to any material fact in the case, you are at liberty to disbelieve the testimony of that witness in whole or in part, and believe it in part and disbelieve it in part, taking into consideration all the facts and circumstances of the case."

The defendant also requested the Court to give its requested instruction numbered "4", which request was refused by the Court, to which refusal the defendant saved its exceptions, said requested instruction being as follows:

4. "You are instructed that fellow servants are servants or employees of a common master or employer who are engaged in the performance for the master of a common undertaking or enterprise to accomplish a common purpose. If you find from the evidence that Luther Duncan was injured at the time and in the manner alleged by him in this suit, but you further find that Luther Duncan and Jake Jackson were both at the time

employees of E. L. Santee, and that E. L. Santee was an independent contractor, and that Jake Jackson was not in the defendant's employ, then you are instructed that Jake Jackson, at the time such injury was sustained, stood in the relation of fellow servant to Luther Duncan and that the defendant would not be liable in this suit for any act of negligence, if any, on the part of Jake Jackson which caused or contributed to plaintiff's injury."

The defendant also requested the Court to give its requested instruction numbered "9", which was as follows:

9. "If you find from the evidence that Luther Duncan was injured by reason of the negligence of Jake Jackson, at the time and in the manner alleged by him in his suit, but you further find that Luther Duncan was himself guilty of one or more acts of negligence which contributed in some degree, however slight, to the occurrence of such injury, and you further find that Jake Jackson was not at the time an employee of the defendant, then your verdict will be for the defendant."

The Court refused to give the foregoing instruction, but modified the same, and, as modified, gave it, as follows:

9. "If you find from the evidence that, at the time of the injury sustained by Luther Duncan, Jake Jackson was not at the time an employee of the defendant, then your verdict will be for the defendant."

To the action of the Court in refusing to give defendant's requested instruction numbered "9", in its original requested form, and in modifying said instruction and giving the same as modified, defendant saved its exceptions.

The foregoing constitute all of the instructions given by the Court, or requested by the parties and refused by the Court, or requested by the parties and modified by the Court, and so given, and all exceptions taken and saved by either of the parties to the giving of any instruction, or to the refusal to give any instruction, in the form requested, or to the modification of any requested instruction.

(Here the Court adjourned until ten o'clock, a. m., on February 18, 1939, at which time it reconvened pursuant to adjournment, when the following further proceedings were had):

The jury, having retired to consider its verdict, and, having duly deliberated thereon, returned into open court its verdict in favor of plaintiff, and assessed his damages in the sum of $16,500.00, for which sum the court directed the entry of judgment.

(Verdict)
(Returned and Filed in United States District Court February 18, 1939.)

"We, the jury, find the issues in this cause in favor of the plaintiff and assess damages in the sum of $16,500.00.

"Miles O. Moore, Foreman."

(JUDGMENT.)

(Entered in United States District Court February 18, 1939.)

On February 16, 1939, this cause came on for hearing pursuant to previous setting and the call of the docket; and came the plaintiff, Luther Duncan, in his own proper person and by his attorneys, O. W. Wiggins, Kenneth W. Coulter and Coulter & Coulter; and came the defendant, Montgomery Ward & Company, by its attorneys, Moore, Burrow & Chowning; and, both parties announcing ready for trial, a jury

was regularly impaneled and sworn to try the cause, and evidence was adduced by both parties before the jury; and, both parties having closed, and the jury, having heard all of the evidence, proceedings, instructions of the court and argument of counsel, and having duly deliberated and considered its verdict, did, on February 18, 1939, return into open court the following verdict:

"We, the jury, find the issues in this cause in favor of the plaintiff and assess damages in the sum of $16,500.00.

"Miles O. Moore, Foreman."

It is, therefore, by the court CONSIDERED, ORDERED and ADJUDGED that the plaintiff herein, Luther Duncan, do have and recover of and from the defendant herein, Montgomery Ward & Company, a corporation, the sum of $16,500.00, together with interest thereon at the rate of six percent per annum from February 18, 1939, until paid, and all of his costs in this cause expended, for which execution, garnishment or attachment may issue according to law.

THOMAS C. TRIMBLE,
United States District Judge.

(MOTION TO ENTER JUDGMENT FOR DEFENDANT NOTWITHSTANDING THE VERDICT, AND MOTION FOR A NEW TRIAL.)

(Filed in United States District Court February 25, 1939.)

Comes the defendant, Montgomery Ward & Company, and files its motion praying that the jury's verdict herein and the judgment rendered and entered thereon be set aside and judgment entered herein for the defendant notwithstanding the verdict, and its motion for a new trial in the alternative, and as grounds therefor states:

A. Grounds for Motion to set aside verdict of the jury and the judgment rendered and entered thereon and to enter judgment for the defendant notwithstanding the verdict:

1. That the verdict is contrary to the law.

2. That the verdict is contrary to the evidence.

3. That the verdict is contrary to the law and evidence.

4. That the evidence introduced by the plaintiff was insufficient to make a prima facie case and fails to establish the relation of employer and employee as between the defendant and Jake Jackson.

5. That the evidence considered in its most favorable light on behalf of the plaintiff was insufficient to support any verdict that might be rendered the plaintiff against the defendant.

6. That the evidence shows as a matter of law that the injury sustained by the plaintiff, if any, on June 27, 1938, was the result of one of the ordinary risks and hazards of his employment which were open and obvious and known to and appreciated by him and assumed by him as a part of his employment.

7. That the evidence shows that the plaintiff was a fellow servant of Jake Jackson; that both were the employees of E. L. Santee; and further shows that E. L. Santee was an independent contractor insofar as the plaintiff and his relations to the defendant were concerned.

8. That the defendant has failed to prove by a preponderance of the evidence that he was injured in the manner alleged in his complaint, and that if injured that he was injured by any negligent act or acts on the part of Jake Jackson.

9. The Court erred in refusing to grant defendant's request for a directed verdict.

B. Grounds for motion for a new trial:

(NOTE: Here follow specifications numbered "1" to "8", inclusive, which are identical with specifications numbered "1" to "8" under Section "A", above, which, for the sake of brevity, are not here repeated.)

9. That the damages found by the jury and the verdict based thereon were excessive.

10. That it was error for the Court to permit Dr. Mahlon D. Ogden, a witness for the plaintiff, to answer a certain hypothetical question propounded by plaintiff's counsel, as amended by plaintiff's counsel, after objection by defendant's counsel, over the objections of the defendant, which hypothetical question, defendant's objection thereto, plaintiff's amendment of such question, the Court's ruling thereon, and the answer of the witness to said question are as follows:

(NOTE: Here follows the hypothetical question propounded to the witness by Mr. Coulter, the objection of Mr. Chowning, the ruling of the court, the amendment by Mr. Coulter, and the answer of the witness, as the same appear at pages 56 to 58 of this record, all of which, for the sake of brevity, is not here repeated.)

11. The Court erred in refusing to grant defendant's request for a directed verdict.

WHEREFORE, the defendant prays that the verdict of the jury herein, and the judgment rendered and entered thereon, be set aside, and a judgment rendered and entered herein in favor of the defendant; and defendant further prays in the alternative that in the event the Court refuses to set aside the verdict rendered for the plaintiff and the judgment in favor of the plaintiff rendered and entered on said verdict, and refuses to render and enter judgment herein in favor of the defendant notwithstanding said verdict and judgment, that the court set aside said verdict and

judgment on behalf of the plaintiff and grant the defendant a new trial herein.

MOORE, BURROW & CHOWNING,
By Frank E. Chowning,
Attorneys for the defendant.

(Here appears the endorsement of counsel for plaintiff of service of the foregoing motion.)

(AMENDMENT TO MOTIONS TO ENTER JUDGMENT FOR THE DEFENDANT NOTWITHSTANDING THE VERDICT, AND MOTION FOR A NEW TRIAL.)

(Filed in United States District Court February 27, 1939.)

Comes the defendant, Montgomery Ward & Company, and amends its motion heretofore filed herein entitled, "MOTION TO SET ASIDE VERDICT OF JURY AND THE JUDGMENT RENDERED AND ENTERED THEREON AND TO ENTER JUDGMENT FOR THE DEFENDANT NOTWITHSTANDING THE VERDICT, AND MOTION FOR A NEW TRIAL", in the following particulars:

That sub-paragraphs numbered 8 of paragraph A. and B., respectively, of said motion are hereby amended so that each of said sub-paragraphs shall read as follows:

"8. That the plaintiff has failed to prove by a preponderance of the evidence that he was injured in the manner alleged in his complaint, and that if injured that he was injured by any negligent act on the part of Jake Jackson."

That in addition to the grounds stated in said motion as a basis for a new trial herein, the defendant adds the following additional errors as grounds for a new trial, and does hereby amend paragraph B. of the aforesaid motion by adding thereto sub-paragraphs 12, 13 and 14, as follows:

12. The Court erred in refusing defendant's requested instruction No. 4.

13. The Court erred in refusing defendant's requested instruction No. 9.

14. The Court erred in modifying defendant's requested instruction No. 9, and in giving said instruction No. 9 as modified, over the objection of the defendant.

WHEREFORE, (Here follows a prayer identical with the prayer of the foregoing original motion, which prayer, for the sake of brevity, is not here repeated.)

MOORE, BURROW & CHOWNING,
By Frank E. Chowning,
Frank E. Chowning,
Attorneys for the defendant.

(Here appears the endorsement of counsel for plaintiff of service of the foregoing motion.)

(OPINION OF THE TRIAL COURT)

(Filed in United States District Court March 29, 1939.)

The plaintiff, Luther M. Duncan, brings this action against the Montgomery Ward & Company, for personal injuries which he alleges he received while in their employ, through the negligence of a fellow servant. There was a trial to a jury and a verdict for the plaintiff. Within apt time the defendant filed a motion for judgment notwithstanding the verdict, and for a new trial in the alternative. The motion was argued orally to the Court and counsel for both parties have submitted well prepared briefs.

The question for consideration in this case is whether or not there is sufficient evidence to support the verdict of the jury.

The plaintiff, Luther M. Duncan, was employed as an experienced laborer by the defendant, Mont-

gomery Ward & Company, as a driver of a truck in making deliveries, and was assisted by a fellow servant, Jake Jackson. At the time of his alleged injury he was performing the ordinary duties of his employment, that is, they were unloading an ice box from the truck, the approximate weight of this box being estimated by the plaintiff as 350 to 450 pounds, and the actual weight as testified by the defendant's manager as 272 pounds. The truck was backed up to a platform, which was ten or twevle inches lower than the end of the truck; the end gate was the width of the bed of the truck, its length being the width of the ice box or thereabouts. When the truck was stopped there the ice box was sitting near the front of the truck from where it was picked up by the plaintiff and his helper, the plaintiff facing and being at the side of the box nearest the end gate, and the helper facing and being at the side of the box nearest the front end of the truck, which necessitated the plaintiff backing and his helper coming forward in carrying the ice box, in such a manner that the ice box was between them and neither could see the other in the moving of the ice box.

The plaintiff testified on direct examination, as follows:

> "* * * me and Jake went in there and got the ice box and when I reached down to get it I would say 'all right', and we would always give the signals because that box was between us, and we edged it back to the end gate and I hollered 'Hold it Jake, take it easy; I am stepping down.' And as I stepped down he kind of raised it up a little bit and threw a little weight on me, and I went down, as I was stepping down.
>
> Q. "He tilted the box over toward you?" A. "Yes, sir."
>
> Q. "It did not fall on you?" A. "No, sir."
>
> Q. "What did you do then?" A. "I hollered

'Set it down Jake.' I was going down and I hollered to him to let it down, let the box down, and all, right there."

Q. "Was there anything said there at that time about what happened?" A. "I told Jake 'I can't do any more; I hurt my back.' "

And on cross Examination:

Q. "What you attempted to do was to carry the ice box in one continuous operation from the truck, the front of the truck, on out the back end of the truck, on past the end gate and step down to the floor of the porch while you were carrying the ice box?" A. "Yes, sir."

* * *

Q. "He (Jake Jackson) did just exactly what you told him to do and always did it willingly and cooperated with you, didn't he?" A. "Yes, sir."

Q. "Now, there was nobody else on this truck to boss Jake besides yourself at the time you were making these deliveries, was there?" A. "No, sir."

* * *

Q. "You felt this pain in your back at the moment you stepped down from the end gate to the little porch, didn't you Mr. Duncan?" A. "Yes, sir."

Q. "And the minute you felt that pain you had to let down the ice box?" A. "Yes, sir."

* * *

Q. "How high would you say that Jake raised that box at the time it was tilted over toward you?" A. "I would not be exact, well, it was something like this, six or eight inches, something like that."

And on redirect examination:

Q. "Was the box tilted over toward you considerably when he raised it?" A. "Yes, sir."

In addition to this, plaintiff's counsel, in the course of their examination of Dr. Ogden, who was the physician for the plaintiff, propounded to the doctor a lengthy hypothetical question, which question terminated with the following words:

Q. * * * "Then, what would you say, in your opinion, most probably caused the patient's trouble?" A. "The lifting of the heavy ice box, or strain."

Dr. Ogden had stated in the course of his testimony that his diagnosis of plaintiff's trouble was sciatic neuritis. Then, in the course of the cross examination of Dr. Ogden, by defendant's counsel the following questions were asked him, and the following respective answers given:

Q. "And isn't it possible, Doctor, in these cases that occur from a strain, that they might be the result of lifting—just come about in an effort naturally—as a natural result of lifting a heavy object?" A. "Yes, sir."

Q. "In other words, if a man would go out here and attempt to lift a sack of oats from the floor, he might get a strain in his lumbar region that might result in a severe attack of sciatic neuritis?" A. "That is right."

In the case of *St. Louis, San Francisco Railway Company* and *Kurn, Trustee*, v. *Childers*, 124 S. W. 964, 967, decided by the Supreme Court of Arkansas, on January 16, 1939, that Court said:

"The weight of the car was such that one might sprain his back in lifting it, and especially so if he performed that duty in an improper manner. This we think is one of the risks of the em-

ployment in which appellee was engaged and which he must be held to have assumed."

Giving the testimony its most probative effect and force, I do not think it is sufficient to sustain a verdict for the plaintiff in this case. There is no testimony showing that Jake Jackson was known by the defendant to be incompetent; or that the defendant was negligent in employing him, but on the other hand the testimony of the plaintiff shows that he cooperated at all times previously with the plaintiff.

The plaintiff as an experienced man knew that this position required the lifting of heavy objects, and also knew the likelihood of more weight being thrown on him in stepping down ten or twelve inches and continuing to carry the ice box. While the plaintiff states that Jake Jackson, his helper, raised the box six or eight inches, yet, in as much as the box did not fall on him, the position of the parties, and the stepping down of the plaintiff, makes it more a matter of conjecture with him as to whether the stepping down ten or twelve inches caused more weight to be thrown on him; because if Jake Jackson raised the box six or eight inches and he stepped down ten or twelve inches, it certainly would have thrown the weight of the box on the plaintiff even more than he has testified. It should be borne in mind these parties could not stand up straight in carrying the box until they reached the end gate, and there is no evidence to show that the raising of this box, if any, was due to negligence on the part of Jake Jackson.

In view of the evidence in this case the court is of the opinion that the motion of the defendant for a judgment notwithstanding the verdict should be sustained, and the verdict of the jury and judgment of the court thereon set aside, and it appearing to the court that the case was fully developed, a judgment will be entered for the defendant in accordance with the provisions of Rule 50 of the Rules of Civil Pro-

cedure in the U. S. District Courts, 28 U. S. C. A., following section 723c.

St. Louis, San Francisco Ry. Co. v. *Burns*, 186 Ark. 921; *St. Louis, San Francisco Railway Co.* v. *Bryan*, 195 Ark. 350; *Missouri Pacific Ry. Co.* v. *Vinson*, decided 7-4-38; *St. Louis, San Francisco Ry. Co.* v. *Ward*, decided 1-16-39; and *St. Louis, San Francisco Ry. Co.* v. *Childers*, decided 1-16-39.

Counsel will, therefore, submit proposed findings of fact, conclusions of law and form of judgment in accordance with this opinion.

THOMAS C. TRIMBLE,
United States District Judge.

(MOTION FOR ORDER SPECIFYING GROUNDS OF RELIEF.)

(Filed in United States District Court April 14, 1939.)

Luther Duncan, the plaintiff herein, pursuant to the opinion of the court heretofore filed in this cause indicating that judgment in this cause would be entered in favor of defendant, notwithstanding the verdict, respectively shows:

That the defendant, in its motion for the relief above mentioned, sets out nine grounds therefor; and, in its amendment to said motion, it sets out additional grounds, aggregating fourteen separate and distinct grounds, as set out in said motion and in the amendment thereto, to which motion and amendment reference is hereby made, the same, by such reference, being made parts hereof as fully as though herein set out.

Your movant further shows that the defendant has submitted to him a proposed form of order and judgment, in which the grounds on which relief is granted are not enumerated; that, in order to limit or restrict the issues on appeal to the material issues, the order and judgment entered herein should specifically show the grounds asserted by defendant on which re-

lief is granted by the court, and should specifically deny, overrule and exclude the other grounds asserted; and that, in order that the judgment of the appellate court may be final, the motion for a new trial should be by this court overruled.

Wherefore, plaintiff prays for an order of this court designating the grounds on which the court grants relief to the defendant herein, and overruling, denying and excluding the other grounds asserted, in order that it may not be necessary to discuss immaterial issues on appeal, and overruling defendant's motion for a new trial, to the end that the judgment of the appellate court may be final. And plaintiff prays for general relief.

O. W. Wiggins,
Kenneth W. Coulter,
Coulter & Coulter,
By Edward H. Coulter, *For Plainitff.*

(ORDER AND JUDGMENT)

(Entered in United States District Court April 17, 1939.)

This cause coming on to be heard on the motion filed by defendant, Montgomery Ward & Company, to set aside the verdict of the jury and the judgment rendered and entered thereon, and to enter judgment for the defendant in accordance with defendant's motion for a directed verdict, and the cause being submitted upon the said motion to set aside the verdict and the judgment thereon and to enter judgment herein for the defendant notwithstanding the verdict, and upon argument of counsel, and it appearing that the defendant, at the close of the plaintiff's evidence and again at the close of all of the evidence in the cause, duly moved for a directed verdict and that said motion was denied but should have been granted:

It is hereby considered, ordered, adjudged and decreed that the said motion be and the same is hereby granted; that the said verdict and the judgment herein

entered thereon on the 18th day of February, 1939, be and the same are hereby set aside, that judgment in this cause be and it is hereby entered for the defendant in accordance with its motion for a directed verdict and notwithstanding the aforesaid verdict; that the plaintiff, Luther Duncan, take nothing against the defendant by and on account of this action, and that the defendant do have and recover of and from the plaintiff all of its costs herein laid out and expended.

This judgment having been rendered on March 28, 1939, but not entered of record, is entered nunc pro tunc.

THOMAS C. TRIMBLE,
District Judge.

(MOTION FOR ORDER ON MOTION
and
FOR ORDER MODIFYING JUDGMENT.)

(Filed in United States District Court April 21, 1939.)

Luther M. Duncan, the plaintiff herein, by Edward H. Coulter, one of his attorneys in this cause, says:

That, heretofore, on February 18, 1939, the jury in the above cause returned a verdict in his favor for $16,500.00; that, within due time, and after entry of judgment on said verdict, defendant filed its motion for judgment notwithstanding the verdict, and, alternatively, for a new trial; that an amendment to said motion was duly filed; that, in said motion, and in said amendment thereto, defendant set out fourteen grounds or specifications for relief; that, on March 28, 1939, the trial judge filed his written opinion in the cause directing, among other things, that a judgment notwithstanding the verdict be entered on defendant's said motion; that, at plaintiff's request, a hearing before the trial judge on the form of the judgment was held on April 7, 1939; that, in said hearing, plaintiff insisted that the judgment, or the opinion of the court, should specify the grounds on which re-

lief was granted, in order that the issues on appeal might be limited to those that are material, and insisted that the motion for a new trial should be passed on, to the end that only one appeal might be necessary; that defendant resisted the request of plaintiff to have the grounds of relief specified, and insisted that its motion for a new trial passed out of existence and consideration on the granting of its motion for a judgment notwithstanding the verdict; that the court did not pass on these contentions at that time, further than to say he did not think the asserted defense of independent contractor had any merit in it, and the matter was passed until April 13 for further action; that, prior to said date, plaintiff filed his written motion seeking the relief above mentioned; that, due to the fact that the court was engaged in other trials, the matter under consideration was not taken up on April 13, but was passed for further consideration at some later date; that plaintiff inquired of the court's secretary on two or more occasions as to the date of the hearing, and on April 17, inquired at the clerk's office, and also conferred with counsel for defendant, the result being an understanding that the question would be considered and settled either on Tuesday, April 18, if the court could reach the same, or on some day to be fixed by the court for the week of April 24; that, on April 19, 1939, he received the following letter:

"Department of Justice

"UNITED STATES DISTRICT COURT
"Office of the Clerk
"Eastern District of Arkansas

"Little Rock, Ark.,
"April 18, 1939.

"Mr. E. H. Coulter, Atty.,
"Little Rock, Ark.,
"Dear Mr. Coulter:—

"Re: Duncan vs. Montgomery Ward, No. 10.

"The court directed me to advise you that he signed the judgment on yesterday as prepared by Mr. Chowning and that his view of the matter was embodied in his opinion heretofore rendered.

"Yours very truly,
"GRADY MILLER, CLERK
"By Darden Moose, D. C."

Your movant further shows that his motion above mentioned was not passed on by the court, and that the form of judgment filed neither specifies the grounds of relief nor passes on the motion for a new trial.

Wherefore, plaintiff prays:

1. That the court definitely pass on his motion herein mentioned.

2. That the judgment filed herein be modified so as to specify the grounds on which relief is granted, and to dispose of all issues in both motions;

3. That the judgment filed herein be modified so as to pass specifically on defendant's motion for a new trial.

And plaintiff prays for general relief.

O. W. WIGGINS,
KENNETH W. COULTER,
COULTER & COULTER,
By Edward H. Coulter,
For Plaintiff.

UNITED STATES OF AMERICA,
STATE OF ARKANSAS,
COUNTY OF PULASKI.

Edward H. Coulter, being first duly sworn, says that he is one of the attorneys for plaintiff in this cause, and that the statements contained in the foregoing motion are true of his own knowledge.

(SEAL) Edward H. Coulter.

Subscribed and sworn to before me, April 20, 1939.

Grace L. Wallace,
Notary Public.

My Commission expires
3-16-40

(O R D E R.)

(Filed in United States District Court April 21, 1939.)

On this day this cause comes on for hearing on the motion of plaintiff for an order on his previous motion filed herein for a specification in the order and judgment of the court of the assignments or grounds urged by defendant in its motion for judgment notwithstanding the verdict on which the court grants relief, and for an order specifically passing on defendant's motion for a new trial, and for a modification of the judgment now entered in the respects set out in the motion now presented; and the court, having considered said motion, finds and concludes that the same does not state facts sufficient to entitle plaintiff to the relief sought.

It is, therefore, by the court considered, ordered and adjudged that the motion of plaintiff above described be, and the same is hereby, in all things overruled and denied.

To the action of the court in failing and refusing to pass on his previous motion for a specification of the grounds urged by defendant on which relief is predicated, and in failing and refusing to pass on defendant's motion for a new trial, and to the action of the court in denying his motion herein presented, and in failing and refusing to modify the judgment entered in this cause so as to specify the grounds urged by defendant on which relief is granted, and so as to show the definite and specific disposition of defendant's motion for a new trial, plaintiff objects, saves his exceptions, and has the same noted of record.

Entered this 21st day of April, 1939.

THOMAS C. TRIMBLE, Judge.

(NOTICE OF APPEAL)

(Filed in United States District Court June 21, 1939.)

Notice is hereby given that Luther M. Duncan, the plaintiff above named, hereby appeals to the Circuit Court of Appeals for the Eighth Circuit from the order and judgment made and entered in this cause on April 17, 1939, setting aside the judgment entered on February 18, 1939, in favor of plaintiff, and entering judgment in favor of defendant.

Signed: Edward H. Coulter;
Attorney for appellant, Luther M. Duncan.
Address: 723 Pyramid Building,
Little Rock, Arkansas.

I hereby certify that I have, on this day, mailed to Frank E. Chowning, Esq., attorney of record in the above styled cause for Montgomery Ward & Company, at his address in Little Rock, Arkansas, a copy of the foregoing notice of appeal.

Witness my hand, this 21st day of June, 1939.
GRADY MILLER, CLERK,
By Darden Moose, D. C.

(COST BOND ON APPEAL)

(Filed in United States District Court June 21, 1939.)

Know All Men By These Presents:

That we, the undersigned, as principal and sureties, are held and firmly bound unto Montgomery Ward & Company, appellee herein, in the sum of Two Hundred Fifty Dollars ($250.00) to be paid to said appellee, for the payment of which well and truly to be made we bind ourselves, and each of us, and our heirs, executors, administrators and successors, jointly and severally by these presents, conditioned as follows:

Whereas, Luther Duncan has prosecuted an appeal to the United States Circuit Court of Appeals for the Eighth Circuit to reverse the judgment rendered

and entered against him in this cause in the United States District Court for the Eastern District of Arkansas:

Now, therefore, the condition of this obligation is such that if the above named Luther Duncan shall prosecute said appeal to effect, or pay all costs if he fails to make said appeal good, then this obligation shall be null and void, otherwise the same shall be and remain in full force and effect.

Luther M. Duncan, Principal.

HARTFORD ACCIDENT & INDEMNITY CO.,
By Mabel McClure Ketcherside,
(SEAL) Attorney-in-fact & Resident Agent.

(POINTS TO E RELIED UPON ON APPEAL)
(Filed in United States District Court June 29, 1939.)

Luther M. Duncan, the appellant herein, for his statement of points to be relied upon on appeal in this cause, says that he will rely upon the points that the trial court committed manifest error to his prejudice in the proceedings, orders and judgment in this cause in the following, to-wit:

1. The trial court erred in granting the motion of defendant for a judgment notwithstanding the verdict, and in setting aside the verdict of the jury and the judgment rendered and entered pursuant thereto, and in rendering and causing to be entered a judgment in favor of defendant notwithstanding the verdict, on the erroneous grounds and hypotheses that the motions therefor were sufficient, that he had the power, after the expiration of ten days, to grant such relief on a ground not asserted in the motions for a directed verdict, that the evidence was not sufficient to support the verdict, that there was no actionable negligence on the part of plaintiff's fellow servant, and that plaintiff assumed the risk of the danger as a result of which he was injured.

2. The trial court erred in finding and concluding that plaintiff assumed the risk of the danger as a result of which he was injured.

3. The trial court erred in finding and concluding that the evidence failed to show any actionable negligence on the part of plaintiff's fellow servant, Jake Jackson.

4. The trial court erred in finding and concluding that the evidence was insufficient to support the verdict of the jury and the judgment entered thereon.

5. The trial court erred in depriving plaintiff of his constitutional right to a trial of the issues of fact in this cause by a jury.

6. The trial court abused his discretion and erred in denying the motion of plaintiff and in refusing to specify the grounds on which he granted to defendant the relief sought.

7. The trial court erred in overruling the motion of plaintiff for an order passing on defendant's motion for a new trial.

8. The trial court erred in overruling the motion of plaintiff to strike paragraphs numbered "1", "2" and "3" of defendant's amendment to its answer, and in permitting defendant, on the day of the trial, to interpose an amendment raising new issues and defenses.

EDWARD H. COULTER,
Attorney for Appellant.

(DESIGNATION OF RECORD ON APPEAL)
(Filed in United States District Court June 29, 1939.)

TO THE HON. GRADY MILLER, CLERK OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF ARKANSAS:

You are hereby notified that Luther M. Duncan, the appellant herein, in connection with an appeal tak-

en by him from the judgment made, rendered and entered in this cause on April 17, 1939, designates as his record on appeal the entire and complete record, omitting duplications and immaterial portions, pursuant to the applicable rules of court, of all pleadings, orders, exhibits, evidence, proceedings, objections of all the parties, and the rulings of the court thereon and exceptions taken, and requests that you incorporate in your record to be certified as the record on appeal in this cause all of said material, true and correct copies of all of which are attached hereto and proffered herewith, with the request that the same be certified as the record on appeal in this cause, subject to any supplements or amendments that may be proffered by defendant pursuant to the applicable rules of court, said material being as follows, to-wit:

1. Caption in trial court.

2. Caption in Circuit Court of Appeals.

3. Complaint, filed August 31, 1938.

4. Notation by appellant incident to removal of cause.

5. Answer, filed October 6, 1938.

6. Order of February 10, 1939, permitting amendment to complaint.

7. Amendment to complaint, filed February 10, 1939.

8. Amendment to answer, filed February 16, 1939.

9. Plaintiff's motion to strike, filed February 16, 1939.

10. Order overruling motion to strike, entered February 16, 1939.

11. Statement of all evidence adduced, with exhibits, defendant's motions for a directed verdict, the court's rulings thereon, the exceptions saved by defendant to such rulings, and instructions of the court to the jury.

12. Verdict of jury, returned and filed February 18, 1939.

13. Judgment on verdict, entered February 18, 1939.

14. Motions of defendant for judgment notwithstanding the verdict, and for new trial, filed February 25, 1939.

15. Amendment to motions for judgment notwithstanding the verdict and for new trial, filed February 27, 1939.

16. Opinion of trial court, filed March 29, 1939.

17. Motion of plaintiff for order specifying grounds of relief, filed April 14, 1939.

18. Judgment setting aside original judgment and entering judgment in favor of defendant, entered April 17, 1939.

19. Motions of plaintiff for order on previous motions and to modify judgment, filed April 21, 1939.

20. Order overruling motions of plaintiff for order on previous motions and on motion for new trial and to modify judgment of April 17, 1939.

21. Notice of appeal, filed June 21, 1939.

22. Cost bond on appeal, filed June 21, 1939.

23. Plaintiff's points to be relied upon on appeal, filed June 29, 1939.

24. This designation, with accompanying notice to and proof of service on counsel for defendant, filed June 29, 1939.

EDWARD H. COULTER,
Attorney for Plaintiff.

(NOTICE OF DESIGNATION OF RECORD ON APPEAL.)

(Filed in United States District Court June 29, 1939.)

TO MONTGOMERY WARD & COMPANY, AND TO MOORE, BURROW & CHOWNING, ITS ATTORNEYS OF RECORD IN THIS CAUSE:

You are hereby notified that Luther M. Duncan, the plaintiff herein, did, on June 21, 1939, file with the clerk of the United States District Court for the Eastern District of Arkansas his notice of appeal from the order and judgment rendered and entered herein on April 17, 1939, setting aside the verdict and judgment of February 18, 1939, and entering judgment in favor of defendant, Montgomery Ward & Company, with which notice he filed his bond for costs as required by the rules of court; and that he has, on this date, filed with said clerk his designation of record on appeal herein, together with two copies of the full transcript of the evidence as transcribed by the official reporter, and together, also, with two copies of all material parts of the complete record in the cause, as set out in said designation, and as he desires the same certified by said clerk as the record on appeal in this cause, full, true and complete copies of all of which, for your information and convenience, are attached hereto, in like manner as they are attached to the designation filed with said clerk; and you are further notified that, in the event said record, as proffered herewith, and as filed with said clerk, should be found by you to be incorrect, incomplete or unsatisfactory in any manner, you should, on or before July 10, 1939, serve and file a designation of such corrections or additions as you may desire to have incorporated in the record on appeal herein, or said clerk will be requested to certify said record in the form here proffered.

EDWARD H. COULTER,
For Appellant.

Kenneth W. Coulter, being first duly sworn, says that he has, on this date, served the foregoing notice and designation of record on appeal by delivering a copy thereof, together with copies of all the documents, papers and records set out in said designation and attached hereto (the same being identical with the record proffered to the clerk of the United States District Court in this cause), by delivering a copy thereof to Frank E. Chowning, Esq., attorney of record for the defendant-appellee herein, at his office in Little Rock, Arkansas.

KENNETH W. COULTER.

Subscribed and sworn to before me, this 29th day of June, 1939.

(SEAL) GRACE L. WALLACE,

My com. ex. 3-16-40. *Notary Public.*

(ORDER EXTENDING TIME FOR FILNG RECORD.)

(Entered in United States District Court July 24, 1939.)

On motion of Kenneth W. Coulter, the time for filing the transcript of the record in the Circuit Court of Appeals in the above cause is extended until September 1, 1939.

Granted at Little Rock, Arkansas, this 24th day of July, 1939.

HARRY J. LEMLEY,
District Judge.

UNITED STATES OF AMERICA,
EASTERN DISTRICT OF ARKANSAS,
WESTERN DIVISION

I, Grady Miller, clerk of the district court of the United States for the Eastern District of Arkansas, in the Eighth Circuit, hereby certify that the foregoing writings annexed to this certificate are true, correct and compared copies of the originals remaining

of record in my office at Little Rock, Arkansas, and that they make and constitute a transcript of the record in the case of Luther M. Duncan vs. Montgomery Ward & Company.

In Witness Whereof, I have hereunto set my hand and the seal of said court this 1st day of August, in the year of our Lord, One Thousand, Nine Hundred and Thirty-Nine, and of the Independence of the United States of America, the One Hundred and Sixty-Fourth.

GRADY MILLER,
Clerk.

(SEAL)

[fol. 120] (Order Permitting Appellant to File Certified Printed Record and Additional Copies.)

United States Circuit Court of Appeals,
Eighth Circuit.

May Term, 1939.

Tuesday, July 11, 1939.

Luther M. Duncan, Appellant,
No. 11,563. vs.
Montgomery Ward & Company, Appellee.

This matter having been presented to the Court on the petition of Luther M. Duncan, appellant herein, for permission to furnish and file printed copies of the transcript of the record in this cause, it is, by the Court, for good cause shown,

Ordered, that appellant be, and he is hereby, granted permission to file in this court the requisite copies of the transcript of the record in this cause, printed in conformity to the rules of this Court, one of which copies shall be certified by the Clerk of the United States District Court for the Eastern District of Arkansas, to be filed as and for, and in lieu of, a certified typewritten copy of such record.

Ordered, this 11 day of July, 1939.

And thereafter the following proceedings were had in said cause in the Circuit Court of Appeals, viz.:

United States Circuit Court of Appeals

EIGHT CIRCUIT

No. 11,536

CIVIL

LUTHER M. DUNCAN, APPELLANT,

VS.

MONTGOMERY WARD & COMPANY, APPELLEE.

AMENDMENT TO TRANSCRIPT STIPULATION

The parties hereto do hereby agree and stipulate by and through their respective counsel of record that the original transcript prepared by the Circuit Clerk of Pulaski County, Arkansas, for the removal of this cause from the Circuit Court of Pulaski County, Arkansas, to the United States District Court for the Eastern District of Arkansas, Western Division, shows the following:

1. That this suit was instituted in the Circuit Court of Pulaski County, Arkansas, on the 31st day of August, 1938, and a summons issued by the Clerk of said Court on the same day and service of said summons had upon the same day by the Sheriff of Pulaski County, Arkansas, on the defendant.

2. That on the 15th day of September, 1938, the defendant served notice upon plaintiff's counsel of record that on September 16, 1938, at 10 o'clock A. M. the defendant would file with said State Court its petition and bond for the removal of this cause to the United States District Court for the Eastern District of Arkansas, Western Divi-

sion, and at the same time present said petition and bond to the Pulaski Circuit Court for the approval of said bond and the granting of said petition by the signing of an order removing said cause to the United States District Court for the Eastern District of Arkansas, Western Division.

3. That on September 16, 1938, at 10 o'clock A. M., defendant filed its verified petition and bond for removal with the Clerk of the Circuit Court of Pulaski County, Arkansas, and immediately presented said petition and bond to the Circuit Court of Pulaski County, Arkansas; whereupon, said bond was approved by the Court and said petition granted by the Court then and there signing an order removing said cause from said State Court to the aforesaid Federal District Court.

4. That on the 21st day of September, 1938, the Clerk of the Circuit Court of Pulaski County, Arkansas, prepared a transcript in due and legal form of the record of said case in said State Court and duly certified to the same, and that said transcript was duly filed in the aforesaid Federal District Court and with the Clerk thereof on the 6th day of October, 1938.

5. That defendant's time for pleading in said State Court had not expired at the time its aforesaid notice of removal was served and its aforesaid petition and bond for removal were filed in the Pulaski Circuit Court.

6. That the aforesaid petition for removal alleged:

"1. That this is an action now pending in the above named Court in which the above named Luther Duncan is plaintiff and your petitioner, Montgomery Ward & Company, is defendant.

"2. That the action is a suit at common law of a civil nature, and the amount involved, exclusive of interest and costs, exceeds the sum of Three Thousand Dollars ($3,000.00); that it is an action to recover damages for personal injuries alleged to have been caused by the negligence of one Jake Jackson who is alleged to be an employee of your petitioner, Montgomery Ward & Company.

"3. Petitioner states that said action involves a controversy between citizens of different states; that the

plaintiff, Luther Duncan, is now and was at the commencement of this action a citizen and resident of the State of Arkansas, and your petitioner was at the time of the commencement of this action, now is and ever since has been a citizen and resident of the State of Illinois.

"4. That the action is one over which the District Court of the United States is given jurisdiction.

"5. The complaint of plaintiff alleges that at the time of the injuries complained of herein, that is July 3, 1938, he was employed by the defendant as a truck driver and that one Jake Jackson was employed by said defendant as a helper on said truck; that on said date plaintiff and the said Jake Jackson were instructed by the defendant to deliver an ice box to Greenbriar, in Faulkner County, Arkansas; that they proceeded to the place where said box was to be delivered, and they backed the truck up to the porch of said place and plaintiff and his helper were in the act of lowering said box to the porch when, without warning, the said Jake Jackson suddenly raised his end of the box, causing the weight of said box which was in excess of four hundred pounds to be thrown on the plaintiff, causing serious and painful injuries to his back, particularly the fourth and fifth lumbar vertebra; that it has been necessary to perform a major operation to remove a portion of the fifth lumbar vertebra; that plaintiff has been totally incapacitated from performing any sort of work since the date of said injury and has suffered excruciating physical pain and mental anguish. Plaintiff alleges that prior to said injury he was an able-bodied man, 29 years of age, and was capable of earning the sum of One Thousand Dollars per year; plaintiff alleges that he is advised and believes that he will never be able to engage in heavy work again, and that for the loss of said earning capacity he has been damaged in the sum of $35,000.00; that he is advised and believes that he will in the future continue to suffer excruciating physical pain and mental anguish for a long period of time, damaging him in the further sum of $5,000.00; that he is advised and believes that it will be necessary to expend large sums of money in the future, in addition to sums already incurred, for medical and hospital treatment, damaging the plaintiff in

the additional sum of $5,000.00. That based on said cause of action plaintiff demands and prays judgment against defendant in the sum of $45,000.00, and for his costs expended.

"6. That your petitioner disputes said claim and denies all liability for the damages and sums of money alleged by the plaintiff to be due him in his said complaint herein.

"7. That the time within which your petitioner is required by the laws of the State of Arkansas and the rules of this Court to plead to the complaint in the above entitled action has not yet expired and will not expire until the 20th day of September, 1938; that your petitioner does not desire to submit in this cause to the jurisdiction of the Circuit Court of Pulaski County, Arkansas, but wishes to preserve all of its rights and privileges as a nonresident and foreign corporation under the jurisdiction of the District Court of the United States in such case.

"8. That by reason of the facts set out herein your petitioner, the defendant herein, desires and is entitled to have this cause removed from said Circuit Court of Pulaski County, Arkansas, to the District Court of the United States for the Eastern District of Arkansas, Western Division.

"9. Your petitioner presents herewith a bond with good and sufficient surety, conditioned that your petitioner will enter in the District Court of the United States for the Eastern District of Arkansas, Western Division, within thirty days of the filing of this petition a certified copy of the record in this suit, and that your petitioner will pay all costs that may be awarded by the said United States District Court in the event that said Court holds that this suit was wrongfully or improperly removed thereto.

"10. That written notice of the filing of this petition and the bond filed herewith, and of the application to remove said cause, has been given plaintiff's attorney for the time and in the manner prescribed by law prior to the filing of this petition and said bond."

7. That the aforesaid bond for removal was and is in due and regular form, in the principal sum of Five Hundred

Dollars ($500.00), with good, sufficient and approved corporate surety, conditioned as follows:

"NOW, If the said Montgomery Ward & Company shall enter in the District Court of the United States within thirty days from the date of the filing of said petition for removal a certified copy of the record in said suit, and shall pay or cause to be paid all costs that may be awarded by said District Court if it shall hold that said suit was wrongfully or improperly removed thereto, then this obligation shall be void, otherwise it shall remain in full force and effect."

8. That no response to or denial of said petition for removal or the grounds of removal set forth therein was filed or interposed in said United States District Court by the plaintiff-appellant, and no defense to said petition for removal was in any manner made, the jurisdictional ground of diversity of citizenship and the amount in controversy governing such removal having been admitted and shown as a part of the allegations in plaintiff's complaint.

Witness our hands and seals on this the 14th day of August, 1939.

EDWARD H. COULTER,
Attorney for Appellant.

FRANK E. CHOWNING.
Attorney for Appellee.

[fol. 126] (Appearance of Mr. O. W. Wiggins as Counsel for Appellant.)

The Clerk will enter my appearance as Counsel for the Appellant.

O. W. WIGGINS.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Jul. 12, 1939.

(Appearance of Mr. Edward H. Coulter and Mr. Kenneth W. Coulter as Counsel for Appellant.)

The Clerk will enter my appearance as Counsel for the Appellant.

EDWARD H. COULTER,
KENNETH W. COULTER,
723 Pyramid Building,
Little Rock, Arkansas.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Aug. 17, 1939.

(Appearance of Counsel for Appellee.)

The Clerk will enter my appearance as Counsel for the Appellee.

FRANK E. CHOWNING,
1101-1108 Boyle Building,
Little Rock, Arkansas.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Sep. 18, 1939.

[fol. 127] (Order of Submission.)

November Term, 1939.

Wednesday, November 29, 1939.

This cause having been called for hearing in its regular order, argument was commenced by Mr. Kenneth W. Coulter for appellant, continued by Mr. Frank E. Chowning for appellee, and concluded by Mr. Edward H. Coulter for appellant.

Thereupon, this cause was submitted to the Court on the transcript of the record from said District Court and the briefs of counsel filed herein.

[fol. 128] (Opinion.)

United States Circuit Court of Appeals
Eighth Circuit.

No. 11,536.—November Term, A. D. 1939.

Luther M. Duncan, Appellant, vs. Montgomery Ward & Company, Appellee.	Appeal from the District Court of the United States for the Eastern District of Arkansas.

[January 23, 1940.]

Mr. Kenneth W. Coulter and Mr. Edward H. Coulter (Mr. O. W. Wiggins was with them on the brief) for appellant.

Mr. Frank E. Chowning (Mr. L. E. Oliphant, Mr. J. Merrick Moore and Mr. Lawrence B. Burrow were with him on the brief) for appellee.

Before Stone, Sanborn and Thomas, Circuit Judges.

Thomas, Circuit Judge, delivered the opinion of the court.

This is an action for damages for personal injuries by a servant against his master. The injury complained of was alleged to be the proximate result of the negligence of a fellow servant. The action is based upon section 9123 of Pope's Digest of the Statutes of Arkansas which declares that all corporations shall be liable in damages for injuries sustained by an employee resulting from the negligence of a fellow employee.

At the close of all the evidence the defendant moved for a directed verdict, which was denied, and the jury returned a verdict in favor of the plaintiff for $16,500 on which a judgment was entered the same day. Within 10 days thereafter the defendant moved for judgment in accordance with its motion for a directed verdict and prayed for a new trial in the alternative pursuant to the provisions of Rule 50(b) of the Federal Rules of Civil Procedure. The court granted the motion and ordered that the verdict and judgment previously entered be set aside, entered judgment for the defendant "in accordance with its motion for a directed verdict and notwithstanding the aforesaid verdict", and for costs. From this order and judgment the plaintiff appeals.

On this appeal these questions only are presented: 1.(a) Was Jake Jackson, appellant's co-employee, guilty of negligence (b) which was the proximate cause of the injury complained of? and 2. Is appellant barred from recovery by the doctrine of assumed risk? All other contentions of appellant, except the procedural question hereinafter noted are conceded by counsel for appellee.

In answer to the first question appellant says (1) that the point was not properly raised in the motion for a directed verdict and (2) that in any event under the evidence this was a question for the jury. As to the second question the appellant says that the doctrine of assumed risk has no application to the case made by the pleadings and the evidence.

The material parts of defendant's motion for a directed verdict are as follows:

"First: The evidence introduced by plaintiff is insufficient to make a prima facie case and fails to establish the relation of employer and employee as between the defendant and Jake Jackson.

"Second: The evidence considered in its most favorable light on behalf of the plaintiff is insufficient to support any verdict that might be rendered the plaintiff against the defendant.

"Third: The evidence shows as a matter of law that the injury sustained by plaintiff, if any, on June 27, 1938, was the result of one of the ordinary risks and hazards of his employment which was open and obvious and known to and appreciated by him, and assumed by him as a part of his employment.

* * * * * *

"Fifth: That the plaintiff has failed to prove by a preponderance of the evidence that he was injured in the manner alleged in his complaint, and that if injured, that he was injured by any negligent act or acts on the part of Jake Jackson."

Rule 50(a) of the Rules of Civil Procedure provides that "A motion for a directed verdict shall state the specific grounds therefor." Of the grounds of the motion for a directed verdict in this case the Fifth is the only one which specifically refers to the alleged negligent act of Jake Jackson, and it does not present a question of law calling for the decision of the court. It charges that the "plaintiff has failed to prove by a preponderance of the evidence that he was injured in the manner alleged", etc. The matter of the "preponderance of the evidence" is a jury question, and not a law question.

The appellee contends that the First and Second grounds of the motion are sufficiently specific to satisfy the requirements of Rule 50(a). These grounds in brief allege that the evidence "is insufficient to support any verdict that might be rendered the plaintiff against the defendant." Assuming without deciding that this is sufficiently specific under the rule to charge that the evidence is insufficient to go to the jury on the question of whether or not Jake Jackson committed the negligent act complained of or, if he did, that that act was the proximate cause of the alleged injury, we think the court erred in sustaining it.

The jurisdiction of the federal court is based upon diversity of citizenship; and the question here presented is controlled by the law of Arkansas. The application of the Arkansas law requires a brief statement of the pertinent facts.

The complaint alleges that plaintiff and his co-employee, Jake Jackson, were ordered by their employer, the defendant, to deliver an ice box weighing in excess of 400 pounds; that while in the act of lowering the ice box from the rear of the truck on which it was transported to the delivery platform Jackson suddenly, negligently and without warning raised his side of the box thereby throwing practically the entire weight of the box on plaintiff, then in a hazardous position, resulting in the serious injury for which damage is sought.

The evidence disclosed that for the purpose of unloading the ice box, which weighed between 350 and 450 pounds, plaintiff and Jackson backed the truck up to the unloading platform and let

down the rear end gate, which projected about three feet over the edge of the platform and was 10 or 12 inches above the platform floor. They had delivered several such boxes; and in so doing they had always called signals to each other and Jackson had always observed such signals. In carrying the ice box from the front end of the truck Jackson, facing the rear of the truck, grasped the bottom of the box, and plaintiff took hold of the opposite side in a similar way and walked backward to the rear of the truck. They could not see each other as they proceeded. Having taken hold of the box, plaintiff called "All right", and they attempted to carry the box to the platform in one continuous operation. It was necessary to walk in a stooped position until they emerged from the body of the truck. When they arrived on the projecting end gate plaintiff "hollered, 'Hold it, Jake, take it easy; I am stepping down.'" At that moment, just as plaintiff was stepping down from the end gate to the platform, without giving any signal or warning, Jake "tilted" the box over toward plaintiff by suddenly raising his side of the box some six or eight inches. At the moment the weight came upon plaintiff as he stepped down to the platform, he felt a pain in his back; and he testified: "I hollered, 'Set it down, Jake * * * I can't d any more; I hurt my back.'" The injury proved to be serious.

The appellee contends, and the trial court in an opinion seems to agree, that the evidence was not sufficient to sustain a finding (1) that the act of Jackson in raising his side of the box under the circumstances was negligent, nor (2) that, if negligent, it was the proximate cause of the injury. The appellant, to support his contention that the court was in error, relies upon *Mississippi River Fuel Corporation* v. *Senn*, 184 Ark. 554, 43 S. W. 2d 255; *Border Queen Kitchen Cabinet Co.* v. *Gray*, 189 Ark. 1137, 76 S. W. 2d 305; *Phillips Petroleum Co.* v. *Jenkins*, 190 Ark. 964, 82 S. W. 2d 264; and similar cases. The appellee does not distinguish the facts in these cases from the facts in the case at bar, but claims that the rule there announced has been repudiated in more recent decisions of the Supreme Court of Arkansas. Counsel for appellee rely upon *St. Louis-San Francisco Ry. Co.* v. *Burns*, 186 Ark. 921, 56 S. W. 2d 1027; *St. Louis-San Francisco Ry. Co.* v. *Bryan*, 195 Ark. 350, 112 S. W. 2d 641; *Missouri Pac. R. Co.* v. *Vinson*, 196 Ark. 500, 118 S. W. 2d 672; *St. Louis-San Francisco Ry. Co.* v. *Ward*, 197 Ark. 520, 124 S. W. 2d 975; and *St. Louis-San Francisco Ry. Co.* v. *Childers*, 197 Ark. 527, 124 S. W. 2d 964.

As applied to the facts of this case we do not find the Arkansas decisions relied upon by the respective counsel for the parties inconsistent. When read together they establish as the law of Arkansas the following principles applicable to the case now before us for decision:

In order to warrant a finding that negligence is the proximate cause of the injury, it must appear that the injury was the actual and probable consequence of the negligence, and that it ought to have been foreseen in the light of the attending circumstances. *St. Louis-San Francisco Ry. Co.* v. *Bryan, supra; Mays* v. *Ritchie Grocer Co.*, 177 Ark. 35, 5 S. W. 2d 728; *Missouri Pac. Ry. Co.* v. *Vinson, supra; St. Louis-San Francisco Ry. Co.* v. *Childers, supra.*

Negligence is never presumed, but the burden is on the party asserting it to establish the fact by a preponderance of the evidence. The test is whether the acts of the fellow servant were those that a person of ordinary prudence would have done under the circumstances. Where fair-minded men might differ honestly as to the conclusion to be drawn from the facts the question is one for the jury. The fact that the verdict is contrary to the preponderance of the testimony furnishes no ground for reversal. *St. Louis-San Francisco Ry. Co.* v. *Ward, supra; Mississippi River Fuel Corp.* v. *Senn, supra; St. Louis-San Francisco Ry. Co.* v. *Burns, supra.*

To establish the negligence of a fellow servant as the proximate cause of an injury it is essential to show that his act was one a person of ordinary prudence would not have done under the circumstances and that there was some inattention, disobedience to orders or other misconduct in the performance of duty that caused the injury. It can not be left to conjecture. Accident must be excluded. *St. Louis-San Francisco Ry. Co.* v. *Bryan, supra; St. Louis-San Francisco Ry. Co.* v. *Childers, supra; St. Louis-San Francisco Ry. Co.* v. *Ward, supra; St. Louis-San Francisco Ry. Co.* v. *Vinson, supra.*

On a motion for a directed verdict the evidence must be considered in its most favorable light on behalf of the plaintiff, and if there is substantial evidence in support of the issues tendered by the plaintiff they must be submitted to the jury. *Missouri Pac. Ry. Co.* v. *Medlock*, 183 Ark. 955, 39 S. W. 2d 518; *St. Louis-San Francisco Ry. Co.* v. *Burns, supra.*

In the instant case the evidence showed that plaintiff and Jackson, his fellow servant, were engaged in delivering ice boxes for

the defendant and that when working on opposite sides of the box where they could not see each other, plaintiff gave signals which Jackson obeyed. On the occasion in question Jackson did not heed the signal given. When the plaintiff called, "Hold it, Jake, take it easy; I am stepping down", Jackson disregarded the signal. That language informed him of the perilous position of plaintiff. Jackson knew the weight of the ice box, that plaintiff was in the act of stepping down from the end gate to the platform, and that it was his duty to "hold" the box and not raise and "tilt" its weight on plaintiff. Further, Jackson owed plaintiff a duty, without reference to signals, to exercise due care for his safety and not to throw the weight of the ice box upon him without notice. This duty he violated. It is the law of Arkansas that when men are working together "each has a right to expect that his fellow workmen will exercise due care in the premises for the safety of the others." *Texas Pipe Line Co.* v. *Johnson,* 169 Ark. 275, 275 S. W. 329, 331; *St. Louis Southwestern Ry. Co.* v. *Smith,* 102 Ark. 562, 145 S. W. 218. Clearly the question of Jackson's negligence was a jury question.

It is equally clear that the question of proximate cause was properly submitted to the jury. There was substantial evidence to warrant the jury in finding that the injury was the direct result of the sudden and unexpected "tilting" of the ice box in disobedience to the signal given by plaintiff. The severe pain was instantaneous. The plaintiff complained at once. The character of the injury was such, as described by the doctors who testified, that the jury was justified in concluding that it could have resulted only from an unusual and extraordinary strain.

The Third specific ground set out in the motion for directed verdict was that the evidence shows as a matter of law that the injury complained of was the result of the risks and hazards assumed by the plaintiff as a part of his employment. Assumed risk as a defense could under Arkansas law be effective only in case the injury was the result of some cause other than the negligent act of a fellow servant. The statute (sec. 9123 of Pope's Digest) makes a corporation employer absolutely liable for damages for injuries resulting from the negligence of a co-employee. The Supreme Court of Arkansas has held repeatedly that a servant "does not assume the risk of danger or peril caused by the negligence of his fellow servant." *L. C. Durr & Co.* v. *Greenlee,* 193 Ark. 705, 708, 102 S. W. 2d 77, 78; *Missouri & N. A. R. Co.* v. *Van Zant,* 100 Ark. 462, 140 S. W. 587; *St. Louis, I. M. & S. Ry. Co.* v. *Ledford,* 90 Ark. 543;

St. Louis Southwestern Ry. Co. v. *Burdg*, 93 Ark. 88, 124 S. W. 239; *Texas Pipe Line Co.* v. *Johnson, supra.* Since the jury found that the injury resulted from the negligent conduct of Jackson, a fellow servant, that finding necessarily removes the question of assumed risk from the case.

Another alleged error of the trial court is his refusal to pass upon defendant's motion for a new trial. Except for the fact that counsel seem to regard the matter of great importance it would be passed by us without comment as without merit.

Rule 50(b) of the Rules of Civil Procedure provides that when a motion for a directed verdict made at the close of all the evidence is denied, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. It is further provided: "Within 10 days after the reception of a verdict, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict * * * A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative."

After the defendant's motion for a directed verdict was denied by the court, the case submitted to the jury, a verdict returned for plaintiff and a judgment entered thereon, defendant within 10 days filed a motion for judgment notwithstanding the verdict and for a new trial in the alternative. The prayer of that motion was:

"Wherefore, the defendant prays that the verdict of the jury herein, and the judgment rendered and entered thereon, be set aside, and a judgment rendered and entered herein in favor of the defendant; and defendant further prays in the alternative that in the event the Court refuses to set aside the verdict rendered for the plaintiff and the judgment in favor of the plaintiff rendered and entered on said verdict, and refuses to render and enter judgment herein in favor of the defendant notwithstanding said verdict and judgment, that the court set aside said verdict and judgment on behalf of the plaintiff and grant the defendant a new trial herein."

The order of the court was "that the said motion be and the same is hereby granted; that the said verdict and the judgment herein entered thereon * * * be and the same are hereby set aside; that judgment in this cause be and it is hereby entered for the defendant

in accordance with its motion for a directed verdict and notwithstanding the aforesaid verdict * * *."

For the reasons heretofore recited that judgment must be reversed. Counsel ask, What, in such a case, becomes of the motion for a new trial when the case is remanded? We have set out the prayer of defendant's motion because a careful reading thereof fully answers the question.

Strictly speaking the motion did not pray for relief in the "alternative", giving the court a choice between two propositions either of which he might grant in the first instance. The court was asked to rule on the motion for a new trial only "in the event" he "refuses to set aside the verdict * * * and judgment * * * and refuses to enter judgment herein in favor of the defendant * * *." The court having granted the prayer of the motion as made did not err in not ruling on the motion for a new trial. The condition on which the court was asked to grant a new trial did not come into existence. The new rules are not intended to prolong litigation by permitting litigants to try cases piecemeal. Their purpose would not be accomplished if when relief is asked on condition or in the alternative the successful party could on reversal go back to the trial court and demand a ruling on his conditional or alternative proposition. The order sustaining the motion for judgment notwithstanding the verdict was equivalent to a denial of the motion for a new trial; and the latter motion passed out of the case upon the entry of the order.

The order and judgment appealed from is reversed with direction to the district court to reinstate the verdict of the jury and the judgment entered thereon.

[fol. 137] (Judgment.)

United States Circuit Court of Appeals,
Eighth Circuit.

November Term, 1939.

Tuesday, January 23, 1940.

Luther M. Duncan, Appellant,
No. 11,536. vs.
Montgomery Ward and Company.

Appeal from the District Court of the United States for the Eastern District of Arkansas.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Arkansas, and was argued by counsel.

On Consideration Whereof, It is now here ordered and adjudged by this Court, that the order and judgment of the said District Court appealed from, in this cause, be, and the same is hereby, reversed with costs; and that Luther M. Duncan have and recover against Montgomery Ward and Company the sum of ..... Dollars for his costs in this behalf expended and have execution therefor.

And it is further ordered by this Court that this cause, be, and the same is hereby, remanded to the said District Court with direction to reinstate the verdict of the jury and the judgment entered thereon.

January 23, 1940.

IN THE

United States Circuit Court of Appeals

EIGHTH CIRCUIT

LUTHER M. DUNCAN ..... *Appellant,*

v. No. 11,536 Civil

MONTGOMERY WARD & COMPANY ..... *Appellee.*

PETITION FOR REHEARING

Appellee, Montgomery Ward & Company, respectfully petitions the Court for a rehearing in the above entitled cause on the following grounds:

I.

In holding that there was sufficient evidence to support the verdict below, the Court has overlooked the fact that, under all the evidence viewed in its most favorable light for the appellant, the jury was nevertheless forced to resort to speculation or conjecture, as found by the trial court in his opinion, in determining whether or not (a) appellant's fellow-servant, Jake Jackson, actually committed the act of negligence charged to him, that is to say, whether he in fact tilted his side of the ice box, or (b) if he did in fact tilt his side of the ice box, such act was the proximate cause of appellant's injury.

In an action for personal injuries where the proven facts give equal support to each of two inconsistent inferences, judgment as a matter of law must go against the party upon whom rests the necessity of sustaining one of those inferences as against the other. *Pennsylvania Railway Co.* v. *Chamberlain, Admx.*, 288 U. S. 333.

This Court, in the case of *E. I. DuPont De Nemours & Company* v. *Baridon*, decided on October 12, 1934, 73 Fed. (2)

26, recognized the same rule in the following language: "Evidence which is equally consistent with two hypotheses tends to support neither," and held that under such a state of facts it is error for the trial court to submit the question in issue to a jury.

The rule in Arkansas, the law of which State is the law of this case, is in harmony with the above rule of this Court. In the cases of *Marathon Oil Company* v. *Sowell,* 191 Ark. 865, 88 S. W. (2) 82, and *Standard Oil Company of Louisiana* v. *Dykes,* 192 Ark. 279, 90 S. W. (2) 758, the Court said: "The law, however, does not permit verdicts and judgments to rest upon speculation and conjecture."

The undisputed evidence, as well as the physical facts, disclose that although the appellant did testify that Jackson raised or tilted the ice box a distance of six or eight inches at the moment that appellant stepped down from the end gate to the unloading platform (R. 39), such statement of the appellant was necessarily based, not upon a known fact, but solely upon an inference, since it is undisputed that the appellant and Jackson could not see each other at the time of the accident because of the intervening ice box, one being on one side of the box and one on the other, and both in a stooping position (R. 102). In other words, it is apparent that the appellant inferred, from the mere fact that his act of stepping down from the end gate to the platform below was accompanied by a tilting of the ice box and a shifting of its weight toward him, that Jackson had tilted or raised his side of the box a distance of some six or eight inches in violation of appellant's warning to Jackson that he, appellant, was about to step down.

It is a matter of common human knowledge, based upon everyday observation, that when two men are carrying a heavy object, with that object between them, and one of them steps down with his side of the object to a level or plane lower than that upon which his fellow-workman still stands, the inevitable result is a shifting of the weight of the object toward the side that has been lowered as a result of the stepping down. When the appellant stepped down from the end gate to the unloading platform below, a distance, according to appellant's own testimony, of some ten or twelve inches, the law of gravity carried his side of the ice box down with him. It was at this moment he received his injury. True, appellant did testify that at the time he stepped down he was *trying* to hold the ice box on a level with him (R. 39), but he at no time testified that he did in fact hold his side of the ice box on its prior

level, and we do not hesitate to say that it was a physical impossibility for Duncan to have stepped down ten or twelve inches and at the same time held his side of an ice box weighing 350 to 400 pounds at the level at which he was holding it before he stepped down.

The trial court, in his opinion, has stated: "While the plaintiff states that Jake Jackson, his helper, raised the box six or eight inches, yet, inasmuch as the box did not fall on him, the position of the parties, and the stepping down of the plaintiff, makes it more a matter of conjecture with him as to whether the stepping down ten or twelve inches caused more weight to be thrown on him; because if Jake Jackson raised the box six or eight inches and he stepped down ten or twelve inches, it certainly would have thrown the weight of the box on the plaintiff even more than he has testified." This quotation from the trial court's opinion is a finding in effect that appellant's statement that Jackson tilted the box toward him while he was stepping down was a mere inference rather than a known fact and that the jury, in rendering a verdict for the appellant, was forced to speculate, first, whether Jackson in fact tilted the box, and, second, if he did tilt the box, whether it was the tilting of the box or the natural shifting of the weight resulting from appellant's stepping down which was the proximate cause of his injury.

The trial court further pointed out in his opinion that appellant's physician, Dr. Ogden, testified as follows:

"Q. Then, what would you say, in your opinion, most probably caused the patient's trouble?

"A. The lifting of the heavy ice box, or strain."

Dr. Ogden further testified that one could get the same sort of injury as was received by the appellant in this instance by the mere effort of lifting a heavy object from the floor, such as a sack of oats (R. 31). If Dr. Ogden is to be believed (he was appellant's own physician and witness and his testimony is undisputed) appellant might have gotten the injury from the strain incident to carrying the box without the weight of the box ever having been shifted upon him from any cause. If, then, appellant could have received this injury merely by the strain incident to the lifting or carrying of his side of the heavy ice box, how could the jury have determined except by speculation and conjecture the proximate cause of appellant's injury?

Negligence will not be presumed; it must be proven. Will it be presumed that Jackson, in the face of an express warn-

ing that the appellant was about to step down, negligently tilted the ice box at that moment? Jackson denies that he tilted it; appellant admits he couldn't see him tilt it. To sustain the verdict of the jury, it must first be inferred, from the mere fact that the weight of the ice box shifted, that Jackson negligently tilted the box. Having indulged this inference, we must next infer, speculate and conjecture that this was the proximate cause of appellant's injury rather than the shifting of the weight of the box upon him resulting from his stepping down a distance of ten or twelve inches and thus carrying his side of the box down with him.

We earnestly ask the Court to give this element of the case further and careful consideration.

II.

The Court, in holding that appellee's motion for a new trial passed out of the case when the lower court granted the motion for a directed verdict under Rule 50 (b), overlooked the purpose and effect of the rule itself in allowing the joining of a motion for a new trial in the alternative. Rule 50 (b), after providing that a party who has moved for a directed verdict may, after the reception of a verdict of a jury, move to have the verdict and judgment entered thereon set aside and to have judgment entered in accordance with his previous motion for a directed verdict, provides further that a motion for a new trial may be joined with this motion or a new trial may be prayed for in the alternative. The new trial here referred to is obviously the new trial provided for in Rule 59 of the Rules of Civil Procedure, which provides that a new trial may be granted in any action in which there has been a trial by a jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the Federal Court. The purpose of Rule 50 (b) is accordingly to permit a motion for a new trial, as provided in Rule 59, to be consolidated and prayed in the alternative with the motion *non obstante veredicto*. The bar generally has supposed, in the light of the announced purpose of the new rules to simplify procedure, that the purpose of Rule 50 (b) was to permit the two motions to be prayed alternatively, thereby making it unnecessary to file the motion provided for in Rule 59 separately; and it has not heretofore been supposed that it was intended by Rule 50 (b) to impose the risk upon a party of having it held that his motion for a new trial has passed out of the case in the event the motion to set aside the verdict and judgment thereon is sustained and thereafter reversed. Such a result seems hardly within the spirit of the rules.

In the beginning we comment briefly upon the Court's statement in its opinion that "strictly speaking the motion did not pray for relief in the 'alternative,' giving the court a choice between two propositions either of which he might grant in the first instance. The court was asked to rule on the motion for new trial 'in the event' he 'refuses to set aside the verdict . . . and judgment . . . and refuses to enter judgment herein in favor of the defendant'."

We cannot agree with the Court's interpretation of the prayer. The rule permits a prayer for new trial in the alternative, and the fact that a new trial was prayed only in the event the court should refuse to set aside the verdict and judgment and should refuse to enter judgment in favor of the defendant in no way keeps the prayer from being in the alternative. According to necessary procedure, the trial court had first to pass on the prayer that it set aside the verdict and judgment thereon and render judgment in favor of the defendant before it could reach the motion for a new trial. The motion to set aside the verdict and for judgment in defendant's favor must necessarily be entertained before the motion for a new trial, and if the former motion were granted there would be no reason to entertain or consider the latter. Appellee's motion, therefore, in asking the court to rule on the motion for a new trial only in the event it should refuse to set aside the verdict and judgment, and to enter judgment in favor of the defendant, merely followed the necessary course of judicial procedure and certainly should not be held for that reason not to have asked for relief in the alternative. To so hold seems to us to introduce into procedural questions the very spirit of over-refinement that it is the avowed purpose of the new rules to abolish.

Coming now to the Court's ruling that the order sustaining the motion for judgment notwithstanding the verdict was equivalent to a denial of the motion for a new trial, and that the latter motion passed out of the case upon the entry of the order, we submit respectfully that it seems at utter variance with the rule. It has always been the practice in Federal as well as State Courts to file motions for a new trial in addition to motions for judgment notwithstanding the verdict. Prior to the adoption of the new rules it was, of course, usual to file the motion for a new trial after the denial of the motion for judgment notwithstanding the verdict. Rule 50 (b) provides that the two motions may be prayed in the alternative and it has not been understood that Rule 50 (b) by giving that privilege is intended to eliminate from the case the motion for a new trial in the event the motion for judgment not-

withstanding the verdict is granted by the trial court and later reversed by the Appellate Court. That ruling, if sustained, serves rather to entrap than to simplify procedure.

What has just been said is all the more apparent when it is remembered that the trial court in passing upon a motion for a new trial is governed by wholly different principles than those that apply when the court is considering a motion for judgment notwithstanding the verdict. In the latter case the question before the court is the same as when it is asked in the first instance to direct a verdict. If there is substantial evidence in support of the issues tendered by the plaintiff it must be submitted to the jury, as stated by the Court in its opinion in this case, and in the event of a verdict the Court has no power to set it aside and enter judgment in favor of the other party. The question is not one of preponderance of the evidence, but only whether there is substantial evidence to support the verdict.

But a motion for a new trial is addressed to the discretion of the trial court and in passing upon such a motion the Court is and should be governed by wholly different considerations. It is not bound to sustain the verdict merely because there may be what in the technical sense constitutes substantial evidence to support it. On the contrary, it is within the discretion of the trial court to set the verdict aside and grant a new trial if in its opinion the verdict is against the preponderance of the evidence.

The rule has been settled in Arkansas by repeated decisions, the court saying, in the case of *Bean* v. *Coffee,* 169 Ark. 1052 (277 S. W. 522), at page 1054:

> "... The duty of the trial court, when it is believed and found that the verdict returned is contrary to the preponderance of the evidence, was thoroughly considered by us in the case of *Twist* v. *Mullinix,* 126 Ark. 427, and we need not repeat here what we there said. A syllabus in that case reads as follows: 'Where the trial court finds positively and unequivocally that the verdict of the jury is against the preponderance of the evidence, it is reversible error for him thereafter to fail to set aside the verdict'."

Presumably the Federal Courts will in accordance with the Conformity Act upon such questions follow the State Court (*Lyon* v. *Mutual Benefit Association,* 305 U. S. 484, 490), and moreover, the rule as settled by the Arkansas deci-

sions is and has been, as we understand it, the rule in the Federal Courts.

Aetna Casualty & Surety Co. v. *Reliable Auto Tire Co.*, 58 Fed. (2d) 100;

Railroad Co. v. *Reeder*, 211 Fed. 280;

U. S. v. *Flippence*, 72 Fed. (2d) 611.

In the light of what has just been pointed out we respectfully and earnestly contend that the Court has erred in holding (1) that "the order sustaining the motion for judgment notwithstanding the verdict was equivalent to a denial of the motion for a new trial," and (2) "that the latter motion passed out of the case upon the entry of the order."

(1) The motion for a new trial, had it been necessary for the court to entertain it, was addressed to the court's discretion and its decision by the court would have involved, as pointed out, wholly different questions as to the sufficiency of the evidence from those that were presented by the motion for a judgment notwithstanding the verdict; and, moreover, the motion for a new trial, as abstracted on pages 97-99 of the Record, included assignments of error that were not included in the motion for judgment notwithstanding the verdict, error being assigned, for example, to the action of the trial court in permitting Dr. Odgen to answer a certain hypothetical question propounded by appellant's counsel over objection of counsel for appellee. Again, as stated by this Court in its opinion, "the condition on which the (trial) court was asked to grant a new trial did not come into existence." This was for the reason that it was necessary for the trial court first to pass on the motion for judgment notwithstanding the verdict. Only in the event that motion was denied could the court entertain the motion for a new trial. Under these circumstances it is indeed difficult for us to understand how the order sustaining the motion for judgment notwithstanding the verdict was in the least equivalent to a denial of the motion for a new trial. When the court sustained the motion for judgment notwithstanding the verdict it became unnecessary to pass on the motion for a new trial and the trial court will not be deemed to have done a useless thing.

(2) Nor can we agree that upon the entry of the order sustaining the motion for judgment notwithstanding the verdict the motion for a new trial passed out of the case. That motion was not acted upon because of the act of the trial court in sustaining the motion for judgment *non obstante*

veredicto, but it did not pass out of the case. If the trial court had denied the motion *non obstante veredicto,* the motion for a new trial would have remained for disposition. Now that the action of the trial court in granting the motion *non obstante veredicto* has been reversed, why does not the motion for a new trial still remain? In answer, we quote the statement of Mr. Simpkins, appearing in his new work on Federal Procedure, 3rd Edition, page 514, Section 702, where, in discussing under Rule 50 (b) the question here presented, he says:

> "If the motion for judgment *non obstante veredicto* is granted, what happens to the motion for a new trial? If left undisposed of, by the trial court, the appellate court, if it reverses the judgment *non obstante veredicto,* can only remand with directions to pass on the motion for a new trial. It would seem *permissible* for a trial judge, while the evidence and witnesses are fresh in his memory, to rule on the motion for new trial in the alternative, such ruling not to become effective unless and until the order granting the judgment notwithstanding the verdict shall thereafter be vacated or reversed in the manner provided by law." (Italics ours.)

In the opinion handed down by this Court it is said: "The new rules are not intended to prolong litigation by permitting litigants to try cases piecemeal. Their purpose would not be accomplished if, when relief is asked on condition or in the alternative, the successful party could on reversal go back to the trial court and demand a ruling on his conditional or alternative proposition."

The language quoted is tantamount to a holding that if a party takes advantage of Rule 50 (b) by joining with his motion for judgment notwithstanding the verdict a motion for a new trial he assumes the risk of having his motion for a new trial held for naught, although never passed upon by the trial court, in case his motion for judgment notwithstanding the verdict is granted and thereafter the order granting it is reversed. Why a party should be so penalized for taking advantage of the rule is not apparent. The risk of prolonging litigation would not seem a sufficient reason, since, as indicated by Mr. Simpkins, it is permissible for the trial judge to rule on the motion for a new trial in the alternative at the same time that he grants the motion for judgment notwithstanding the verdict. If the trial judge declines to rule on the motion for a new trial, that is not the defendant's fault, since the matter is entirely within the trial judge's discre-

tion. In any event, the chances of prolonging litigation are not great. In case it should be held that the motion for a new trial remains in the case undisposed of it would only be necessary for this Court to reverse the judgment *non obstante veredicto*. In that event, the verdict and the judgment thereon would be reinstated and it would be necessary only to remand the case to the trial court with directions to pass on the motion for a new trial.

The trial court took the view that ruling upon the motion for a new trial, after the motion for a judgment *non obstante veredicto* had been granted, would not only have been premature and futile but inconsistent with the prior act of the court in granting the motion *non obstante veredicto*. As a result of this view the trial court entered an order refusing to pass upon the motion for a new trial after the other motion had been granted (R. 111). To so construe Rule 50 (b) as to hold that the appellee has lost all of its rights preserved in its motion for a new trial simply because the court granted its motion for judgment *non obstante veredicto* is, we respectfully urge, to deny to the appellee substantial justice, and such a construction is not an aid in the accomplishment of the purpose of the new rules. On the contrary, we submit that such an interpretation of the new rules is at variance with their spirit and purpose. Instead of tending to simplify procedure and to protect litigants from its technicalities, its effect would be just the reverse.

Wherefore, appellee prays that this petition for rehearing be granted, and the judgment of the District Court of the United States for the Western Division of the Eastern District of Arkansas be affirmed, but in the event the judgment is reversed and the cause remanded to the District Court with directions to reinstate the verdict of the jury and the judgment entered thereon, that the trial court be directed to pass upon appellee's motion for a new trial.

Respectfully submitted,

L. E. OLIPHANT,
Chicago, Illinois.

J. MERRICK MOORE,
LAWRENCE B. BURROW,
FRANK E. CHOWNING,
Attorneys for Appellee.
Little Rock, Arkansas.

CERTIFICATE OF COUNSEL

I certify that I am one of the counsel who signed the foregoing petition for a rehearing; that the petition is filed in good faith and not for delay; and that it is filed to call the court's attention to material matters of law and fact which counsel believes were inadvertently overlooked by the court as shown by its opinion.

FRANK E. CHOWNING.

[fol. 148] (Order Denying Petition for Rehearing.)

November Term, 1939.

Monday, February 12, 1940.

The petition for rehearing filed by counsel for the appellee having been considered, It is now here Ordered by this Court that the same be and it is hereby denied.

February 12, 1940.

(Motion of Appellee for Stay of Issuance of Mandate.)

Now comes Montgomery Ward & Company, the appellee in the above entitled cause, by Frank E. Chowning, one of its attorneys of record herein, and shows to the court:

That this Court on the 23rd day of January, 1940, reversed the order and judgment rendered in this cause by the United States District Court for the Western Division of the Eastern District of Arkansas on the 17th day of April, 1939, which set aside the verdict of the jury and the judgment entered on said verdict on the 18th day of February, 1939, and [rdndered] judgment for this appellee notwithstanding such verdict and judgment, and further ordered said District Court to reinstate the judgment entered upon said verdict.

That this Court, in ordering the aforesaid judgment non obstante veredicto set aside and the original judgment rendered by said District Court on the verdict of the jury reinstated, held, among other things, that the motion for a new trial filed by the appellee in said District Court within ten days from the date that such verdict and judgment [fol. 149] thereon was rendered, which motion was joined with a motion on behalf of the appellee for a judgment non obstante veredicto in the alternative, passed out of this case when said District Court granted the appellee's motion for a judgment non obstante veredicto.

That within the time allowed under the rules of this Court the appellee filed its petition for rehearing in this Court, setting forth that this Court erred in holding that appellee's motion for a new trial in said District Court

passed out of said case with the granting by said District Court of appellee's motion for a judgment non obstante veredicto, and praying this Court to grant the appellee a rehearing and upon such rehearing to modify its order and judgment entered herein on the 23rd day of January, 1940, reversing this cause, to the extent of remanding this cause and ordering and directing said District Court to pass upon appellee's motion for a new trial.

That on the 13th day of February, 1940, this Court entered an order herein denying appellee's petition for rehearing and as a result thereof a mandate will issue out of this Court on said order and judgment on the 23rd day of February, 1940, unless stayed by order of this Court.

That the appellee is aggrieved by the order, judgment and decision of this Court rendered herein on the 23rd day of January, 1940, in that it is the contention of the appellee that the order, judgment and decision of this Court herein rendered on the 23rd day of January, 1940, and this Court's order denying appellee's petition for rehearing rendered herein on the 13th day of February, 1940, are erroneous and contrary to the provisions, purposes and effect of Rules 50 and 59 of the Federal Rules of Civil Pro-
[fol. 150] cedure which became effective on September 17, 1938, and especially that part of Rule 50 known as Rule 50 (b).

That the appellee desires to file a petition to the Supreme Court of the United States asking that a Writ of Certiorari be issued to this Court in this cause with the view of having the Supreme Court of the United States pass upon that part of this Court's order, judgment and decision rendered herein on the 23rd day of January, 1940, holding that appellee's aforesaid motion for a new trial has passed out of the case, and denying appellee's prayer that this Court's aforesaid order, judgment and decision be modified by remanding this cause and ordering said District Court to now pass upon appellee's motion for a new tiral.

Wherefore, the appellee prays that the mandate of this Court be stayed and withheld for a period of thirty days from the date that the court passes upon this motion in or-

der that the appellee may take the necessary steps to obtain a Writ of Certiorari in the Supreme Court of the United States.

Dated this 17th day of February, 1940.

FRANK E. CHOWNING,
As Attorney for Montgomery Ward & Company.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Feb. 19, 1940.

[fol. 151] (Order Staying Issuance of Mandate.)

November Term, 1939.

Tuesday, February 20, 1940.

On Consideration of the motion of appellee for a stay of the mandate in this cause pending a petition to the Supreme Court of the United States for a writ of certiorari, It is now here ordered by this Court that the issuance of the mandate herein be, and the same is hereby, stayed for a period of thirty days from and after this date, and if within said period of thirty days there is filed with the Clerk of this Court a certificate of the Clerk of the Supreme Court of the United States that a petition for writ of certiorari, record and brief have been filed, the stay hereby granted shall continue until the final disposition of the case by the Supreme Court.

February 20, 1940.

[fol. 152] (Clerk's Certificate.)

United States Circuit Court of Appeals,
Eighth Circuit.

I, E. E. Koch, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing contains the transcript of the record from the District Court of the United States for the Eastern District of Arkansas, as prepared, printed and certified by the Clerk of said District Court to the United States Circuit Court of Appeals in pursuance of the order of the

United States Circuit Court of Appeals of July 11, 1939, and full, true and complete copies of the pleadings, record entries and proceedings, including the opinion, had and filed in the United States Circuit Court of Appeals, except the full captions, titles and endorsements omitted in pursuance of the rules of the Supreme Court of the United States, in a certain cause in said Circuit Court of Appeals wherein Luther M. Duncan was Appellant and Montgomery Ward & Company was Appellee, No. 11,536, as full, true and complete as the originals of the same remain on file and of record in my office.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this twenty-first day of February, A. D. 1940.

E. E. KOCH,

(Seal) Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

[fol. 151] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed April 8, 1940

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.